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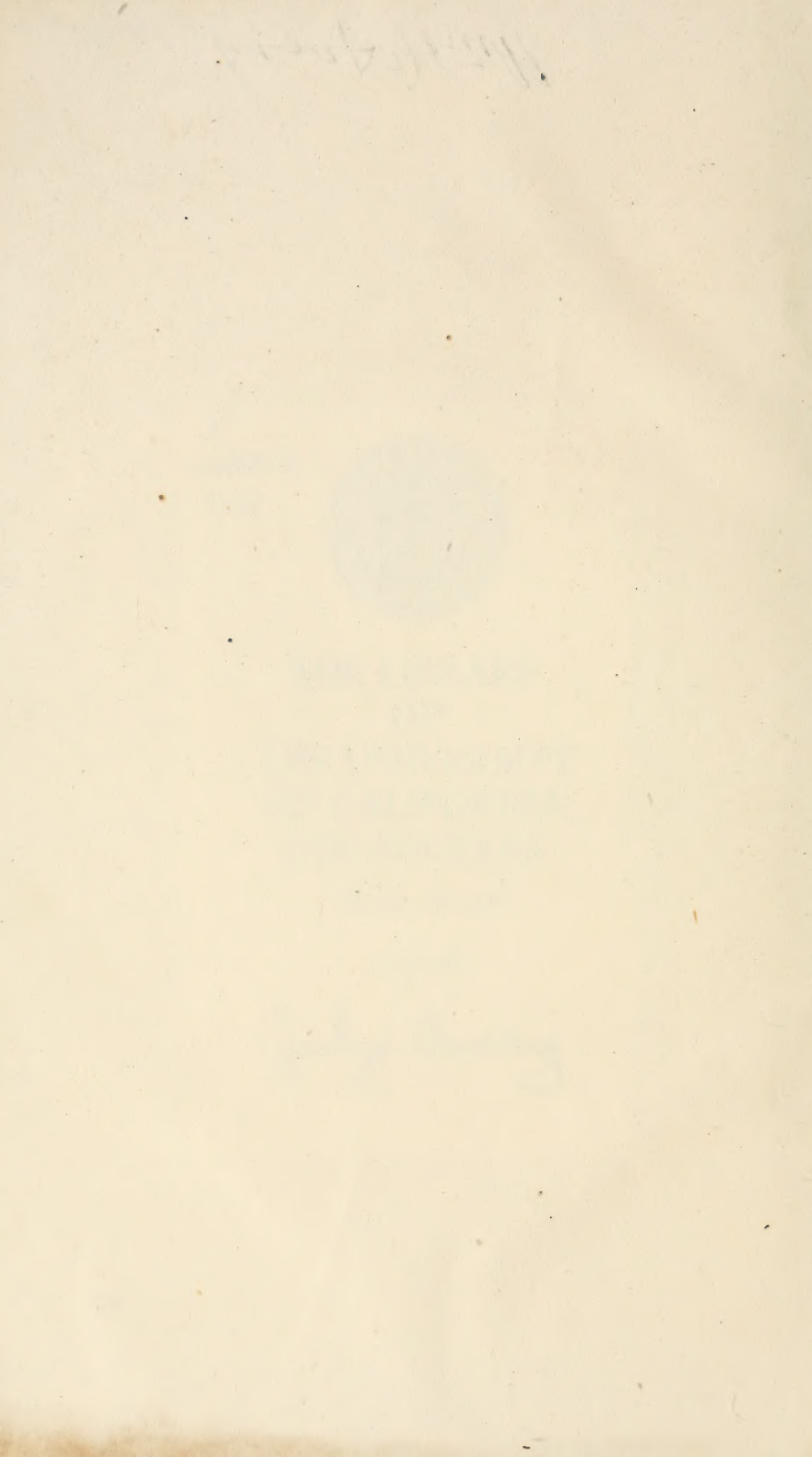
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A TREATISE

LAW OF REAL ESTATE

BY JAMES H. HARRIS

OF THE BAR OF THE DISTRICT OF COLUMBIA

THIRD EDITION, REVISED AND ENLARGED

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A TREATISE

LAW OF REAL ESTATE

BY JOHN HENRY COOPER

OF THE BAR AT LONDON

FORMERLY OF THE BAR AT LONDON

SECOND EDITION, REVISED

BY JOHN HENRY COOPER

OF THE BAR AT LONDON

WITH NOTES BY THE AUTHOR

IN TWO VOLUMES

LONDON

A TREATISE

ON THE

LAW OF REAL ESTATE,

AND OF THE

MODE OF ALIENATION THEREOF;

WITH AN APPENDIX OF

FORMS OF CONVEYANCING, AND NOTES;

Adapted to the Law of the State of New York.

BY JOHN WILLARD, LL.D.,

LATE ONE OF THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK,
AND AUTHOR OF A TREATISE ON EQUITY JURISPRUDENCE, AND A TREATISE
ON THE LAW OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

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P R E F A C E.

THE object of this treatise is to give a general view of the existing law of real property in this state, and of the mode of conveying and charging the same.

No man can become a good pleader or conveyancer until he has become acquainted with the doctrine of estates. It is indispensable that he should know, when called upon to advise as to the form of a deed, lease or mortgage, what interest the grantor possesses, and what he proposes to convey to another; how that interest may be affected by charges and incumbrances; and how these latter may be ascertained and removed. The whole law of title to things real, whether derived by descent or purchase, is, therefore, an essential part of the education of a lawyer; and especially, of a conveyancer.

There are few subjects of English jurisprudence which have been more fully discussed than those which relate to real estate, and its mode of alienation. From the time when Littleton wrote his treatise on TENURES, more than four hundred years ago, to the present day, the subject has, in various forms, enlisted the best talents of the English juridical writers. Although most of their works contain matter of great value to an American student, they are encumbered with much that is useless to him, and which, indeed, may in many instances, mislead him.

Our jurisprudence, though based upon the common law, underwent many changes in adapting itself to the condition of the country.

It was besides modified from time to time by the usages and legislation in colonial times. It was radically changed, in some of its features, at the close of the revolution. But the greatest and most thorough revision and reforms were made by our revised statutes, which went into operation in 1830. That year may be taken as the era, at which our law of real property was made to assume a regular and consistent shape. The statutes as thus revised, together with the judicial decisions and subsequent enactments, and such portions of the common law as have been retained, constitute, at this day, the law of New York.

Although the revision was accomplished by gentlemen of great talents and extensive acquirements, and the work was executed with an ability which will forever entitle its authors to our reverence and gratitude, it was obvious from the very nature of all human institutions, that there would still remain doubts and difficulties which could only be solved by judicial expositions, or by the legislature. Until the system, therefore, had been in operation for years, and its various provisions subjected to the test of actual experience, the full effect of the various changes which were made, could not be known. A treatise written immediately after the revision could only give the changes in connection with the former law; but could not with safety anticipate the views which the courts might adopt, after the searching criticisms of learned counsel. It was the opinion of some eminent jurists that a century would elapse before the law of trusts and of powers, for example, as modified by the revised statutes, would be as well understood as they were before the revision. Men are governed more by usage than by written law; and hence it requires time to mature any system, however wisely it may be devised.

Most of the changes introduced into our law of real estate have been in operation over thirty years; some indeed for more than twice that period, and a few others for a shorter time. The reported decisions of our higher courts, since 1830, embrace near a hundred volumes; in addition to which many volumes of opinions

of subordinate tribunals of great learning and respectability, have also been published. Various questions in the law of real property have been elaborately discussed and examined, in these volumes. Many doubtful questions have become settled; and the people have become accustomed to the system. It would seem that it is not too early, at this time, to bring these decisions into harmonious connection with our former law, and our existing statutes.

In the Appendix are collected a number of forms of such conveyances as most usually occur in practice, together with such forms of acknowledgments and proofs of their execution as are essential to entitle them to be recorded. Great pains have been taken to insert none but such as may be relied on by the practitioner; and subjoined to the precedents are references to adjudged cases in which their accuracy has been recognized. The number of these forms might have been indefinitely increased. It is impossible, and perhaps not desirable to anticipate every case that may occur. An attempt to do so would swell the book to an inconvenient size.

In preparing this work it has been the anxious endeavor of the author to state the law as it now exists. In doing so, he has occasionally had to show how the law formerly was, and the reasons for the change. He has in general referred to enough of the adjudged cases and approved works of authority to enable the counsellor to test the accuracy of his conclusions, and to pursue the subject for himself more at large. He has rarely pointed out defects, conceiving it to be his business to state the law as he found it; and to leave it for statesmen and legislators to propose the changes, if any be required. Some changes have indeed been made by the legislature while this work was in progress. He has devoted much time and labor to the treatise, and hopes it may be of use to the profession, whose kindness and indulgence to his other works are most gratefully appreciated.

JOHN WILLARD.

SARATOGA SPRINGS, *March*, 1861.

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LAW OF ESTATES.

PART I.

OF THE LAW OF REAL ESTATE.

CHAPTER I.

OF TENURE; AND OF THE PERSONS CAPABLE OF HOLDING AND CONVEYING LAND.

SECTION I.

Of Tenure.

A PRELIMINARY dissertation on tenures, has been deemed in England a necessary introduction to the law of real property. Much of this branch of the law has its origin in the feudal system. (1 *Cruise, Greenleaf's ed. p. 1.*) This system, as it was established in Normandy, is said to have been first introduced into England by William the Conqueror. One of the principal fruits of that event was the adoption of the maxim, or fiction of English law, that all the lands in the kingdom were originally granted out by the king; and held mediately or immediately of the crown, in consideration of certain services to be rendered by the tenant. The thing holden was called a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. (*Ibid.* 23.) Lord Coke, in his Commentary upon Littleton, after showing the origin of the word tenant, says, "We have not properly in the law of England, *allodium*, that is, any subject's land that is not holden." (*Co. Litt.* 1 b.)

The distinctive difference between *feudal* and *allodial* tenure is

that the former denotes a holding of some superior by service of some kind, and the latter a holding free from any rent or service. They are the opposites of each other.

On the settlement of this country by emigrants from England, such parts of the common law, and statute law of that country, as were applicable to our circumstances, were in general adopted by the colonies. But the feudal system was never adopted; though many of the terms and phrases, having their origin in that system, were incorporated into our laws, and were frequently so used in our conveyances. They are still used, though generally in a different or modified sense, from their original meaning. A brief sketch of the feudal system, and of the ancient and modern English tenures, will be found in the first title of Cruise's Digest, in Blackstone's Commentaries, and in Kent's Commentaries; but it is not deemed necessary, for the purposes of this treatise, to enlarge upon the subject.

Tenure, in its appropriate sense, denotes the mode or principle of holding of a superior by service; and is the fundamental principle of the feudal system. Though in this country all title is derived from the government, it is not so derived in a feudal sense.

In this state, at an early day after the revolution, the act concerning tenures was enacted. (1 *R. L.* 70.) It has remained a part of our system ever since, and will be considered hereafter more at large in its proper place. At present it is only necessary to mention that it is expressly enacted that the people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all the lands within the jurisdiction of the state. It is further provided that all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people. (1 *R. L.* 380, § 2. 1 *R. S.* 718. 3 *id.* 2, 5th ed.) By the same statute all lands within the state are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners according to the nature of their respective estates; and all feudal tenures of every description with all their incidents are abolished. (3 *R. S.* 2, 5th ed.) This statute has several times been the subject of judicial interpretation. It has been generally treated as putting an end to all feudal tenures between one citizen and another. It has been held to be retro-active, and that after its passage all restraints upon alienation contained in conveyances in fee, whether executed before or after its date, are void.

(*De Peyster v. Michael*, 2 Seld. 467. *Van Rensselaer v. Hays*, 19 N. Y. Rep. 68. *Jackson v. Hart*, 12 John. 81.)

But the act provided that the abolition of tenures should not take away or discharge any rents or services certain, which at any time theretofore had been or thereafter might be created or reserved; nor should it be construed to affect or change the powers or jurisdiction of any court of justice in the state. (3 R. S. 2, § 4, 5th ed.)

The principles of the act of 1787, enunciating the original and ultimate property of the people of this state, in their right of sovereignty, in and to all lands within their jurisdiction; and declaring that all lands the title to which shall fail from a defect of heirs, shall revert or escheat to the people; and abolishing all feudal tenures of every description, with all their incidents, saving however all rents and services certain which at any time theretofore had been lawfully created or reserved; and declaring all lands within this state to be allodial, subject only to the liability to escheat; are contained in the organic law, and form a part of the present constitution. (*Const. of 1846, art. 1, §§ 11-13.*)

The early settlers of this country did not claim the right of soil by virtue of discovery and settlement except as against other nations, and conceded the right of occupancy to the aborigines. The settlers merely claimed the right of pre-emption, admitting that it belonged to the government to extinguish the Indian title by purchase, which has in every instance been done. (*Johnson v. McIntosh*, 8 Wheaton, 543, 574. *Martin v. Waddell*, 16 Peters, 367.) The title of individuals was derived from their own governments. (*Jackson v. Hart*, 12 John. 81.)

The oppressive features of the feudal system were never adopted in this country. They were abolished, even in England, by the act of 12 Charles 2. But the idea and language of tenure have been retained to a certain extent to the present day; and much of the language of conveyances had its origin under institutions which have long since passed away. There is no practical inconvenience in these changes, since the rights which the language represents are in all cases, either recognized by statute or by local usage. The doctrine of escheat and of waste, and many of the doctrines in relation to rents, are of feudal origin.

SECTION II.

Of the persons capable of holding and conveying lands.

It is in this state declared by statute, (1 *R. S.* 719,) that every citizen of the United States is capable of holding lands within this state, and of taking the same by descent, devise or purchase. The same statute further declares that every person capable of holding lands (except idiots, persons of unsound mind and infants) seised of or entitled to any estate or interest in lands, may alien such estate or interest at his pleasure, with the effect and subject to the restrictions and regulations provided by law. (*Id.* § 10.) This is merely declaratory of the common law.

In the case of *Scott v. Sanford*, (19 *Howard*, 393,) the supreme court of the United States decided that a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a *citizen* within the meaning of the constitution of the United States. That case does not affect the question whether such negro, if born in this country and no longer a slave, is capable of holding and aliening lands within the state of New York. The constitution of 1777 makes no distinction of color with regard to inhabitants entitled to vote, or to hold real estate, and by a strong implication admits the capacity of colored persons who labor under no other incapacity, to hold and of course to convey real estate. This feature has been retained in both the subsequent constitutions, so far as relates to negroes.

But a different rule prevailed in relation to Indians. They were not treated as citizens, but as distinct tribes or nations, being under the protection of the government. No person was allowed to purchase any right or title to land from any Indian, without the authority or consent of the legislature. (*Goodell v. Jackson*, 20 *John.* 693. 1 *R. S.* 719, § 12.) Many statutes were enacted on the subject with a view to protect the Indians against fraud and imposition, which will be found collected and reviewed by Chancellor Kent, in his elaborate opinion in the last mentioned case. These statutes were founded on wise and considerate principles of justice and policy. The necessity for them has in a great measure ceased, with the diminished number, and the improvement of the tribes. Accordingly our legislation on the subject has undergone corresponding

changes. By the act of 1843, (*ch. 87, § 4, 3 R. S. 3, § 13, 5th ed.*) any native Indian is permitted, after the passage of that act, to purchase, take, hold and convey lands and real estate in this state, in the same manner as a citizen; and whenever he shall become a freeholder to the value of one hundred dollars, he is made liable on contracts and subject to taxation and to the civil jurisdiction of the courts of law and equity of this state, in the same manner and to the same extent as a citizen thereof. By a subsequent statute, all nations, tribes or bands of Indians who own and occupy Indian reservations within this state, and hold lands therein as the common property of such nations, tribes or bands, are permitted by the acts of their respective Indian governments to divide such common lands into tracts or lots, and distribute and partition the same or parts thereof, quantity and quality relatively considered, to and amongst the individuals or families of such nations, tribes and bands respectively, so that the same may be held in severalty and in fee simple according to the laws of this state; but such lands are not to be set off to any person other than the occupant or his or her family. (*Laws of 1849, ch. 420, § 7. 3 R. S. 4, § 18, 5th ed.*)

The disability of alienage is somewhat modified by our statutes. At common law, though an alien might purchase land, or take by devise, he could only hold until an inquest of office was found. He was thus in constant danger of having his lands taken from him by the paramount authority of the state. But it is now provided that any alien who has come, or may hereafter come into the United States, may make a deposition in writing, that he is a resident of, and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization; and on having the same recorded in the office of the secretary of state, he is authorized and enabled to take and hold lands and real estate of any kind whatever, to him and his heirs and assigns for ever; and may, during six years thereafter, sell, assign, mortgage, devise and dispose of the same in any manner as he might and could do if he were a native citizen of this state or of the United States, except that he shall have no power to demise any real estate which he may take or hold by virtue of this provision, until he becomes naturalized. (*1 R. S. 720, § 15, as amended in 1834, ch. 272. 3 R. S. 5, §§ 24, 25, 5th ed.*) This statute holds out inducements to an alien seeking his fortune

amongst us, to perfect his naturalization as rapidly as possible; for when once naturalized, he is entitled to all the privileges and immunities of a natural born subject. By pursuing the course pointed out in the statute he can anticipate some of the benefits intended to be conferred by naturalization.

Although in some respects a corporation aggregate is not a citizen within the meaning of the constitution of the United States, (*Bank of United States v. Devereux*, 5 Cranch, 61,) yet it is quite obvious that in the statute of this state relative to the persons capable of holding and conveying lands, (1 R. S. 719; 3 *id.* 3, 5th ed.) the use of the term *citizen of the United States*, to designate the persons capable of holding and aliening lands within this state, was not intended to exclude corporations from these privileges. A corporation has been held to be embraced under a statute imposing taxes on *inhabitants* of a town. (2 *Institutes*, 703.) It has been held to be comprised under terms denoting *persons, residents, &c.* (*The People v. Utica Ins. Co.* 15 John. 382. *Conroe v. Nat. Protection Ins. Co.* 10 How. Pr. Rep. 403.) The statute defining the general powers, privileges and liabilities of corporations, forming a part of the same revision of 1830, declares that every corporation as such has power amongst other things to hold, purchase and convey such real or personal estate, as the purposes of the corporation shall require, not exceeding the amount limited in its charter. (1 R. S. 599. 3 *id.* 596, 5th ed.) And this is probably the same power which is incident, at common law, to all corporations, not expressly forbidden to deal in real estate. (*Angell & Ames on Corporations*, 83 *et seq.* *Moss v. The Rossie Lead Mining Co.* 5 Hill, 137.)

A corporation, although created but for a limited period, may acquire a title in fee to lands necessary for its use. Even if the deed lacks words of perpetuity, it takes a fee unless it is in terms restricted to some less estate. (*Nicoll v. The New York and Erie Rail Road Co.* 2 Kern. 121.)

CHAPTER II.

OF REAL ESTATE, ITS NATURE, QUALITY AND QUANTITY OF INTEREST.

The most comprehensive definition of real property is into *lands*, *tenements* and *hereditaments*. *Land*, according to Coke, (1 *Inst.* 4 *a.*) in its legal signification, comprehends any ground, soil, or earth whatsoever, and all buildings erected thereon. (*Mott v. Palmer*, 1 *Comst.* 569, 570.) It extends indefinitely upwards as well as downwards; the maxim being *cujus est solum ejus est usque ad cælum*. *Tenement* signifies that which may be holden. It is a word of a larger signification than *land*, and by it not only land and other inheritances which are holden will pass, but also offices, rents, commons, profits apprender out of lands and the like wherein a man hath a frank-tenement and whereof he is seised *ut de libero tenemento*. (1 *Inst.* 6 *a.*)

Hereditament is a term of still larger import, for it comprehends whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixt. (*Id.*)

Real property is thus either *corporeal* or *incorporeal*. The first consisting wholly of substantial permanent subjects, all which might, at common law, be comprehended under the name of *land*; the last such as are not the subject of the senses, but exist in the mind only, as rents, commons, ways and the like, being rights issuing out of the realty. Indeed, the New York revised statutes expressly provide that the term "real estate," and "lands," as used in the chapters relative to real estates and to title by descents, shall be construed as coextensive in meaning with *lands*, *tenements* and *hereditaments*. (1 *R. S.* 750, § 10. *Id.* 755, § 27.)

It must be remembered that the legal meaning of the word *estate* is different from its popular acception. In the latter sense it is often, and perhaps generally, used to denote the land itself. But in the appropriate legal signification, it is used to denote the particular *right* which the owner may exercise in a certain piece of land. An *estate* in land, therefore, is the interest which the owner has therein. (*Van Rensselaer v. Poucher*, 5 *Den.* 40. 1 *Prest. on Estates*, 7, 20. 1 *Cruise's Dig.* ch. 3, tit. 1, § 11.) Such estate may

greatly vary in quantity or duration, as it may also in respect to the time of enjoyment, the number and connection of the tenants, and the provisos, conditions and limitations under which it is held. A *seisin of land* should never be pleaded, but of an *estate in-land*. This is conclusively shown by the authorities. (*Van Rensselaer v. Poucher, supra.*) The *quantity* of an estate signifies the time of continuance or degree of interest, and the *quality* of an estate has reference to the manner of its enjoyment, as whether it be absolutely, solely, in common, in coparcenary, or in joint tenancy. (1 *Prest. on Est.* 21.) In some cases it is said that there is so near a relation between the quantity and quality of an estate, that the quality of the estate is the measure of its quantity. The determinable quality of the estate is marked by the clause, if the grantee should so long live; and this phrase also forms part of the quantity or measure of the estate. (*Id.* p. 22.) Mr. Preston illustrates it more fully by putting the case of a grant to a man and his heirs, so long as a tree shall stand. In this instance, he observes, that the words which relate to the tree form an essential part of the measure of the estate, and at the same time, render the estate a determinable fee, (being its quality,) instead of being an absolute fee. (*Id.*)

The foregoing observations are sufficient by way of introduction to the distribution of estates under the provisions of the revised statutes of 1830. (1 *R. S.* 722, *et seq.* 3 *id.* 10, *et seq.* 5th ed.) The statute recognizes the distinctions between the *quantity* and the *quality* of estates; and with a view to simplify the subject and to incorporate the improvements, in their proper place, it adopts from writers of approved authority the classification existing in the common law, with such modifications as their experience and wisdom had pointed out.

The first six sections of the statute relate mainly to estates with reference to their quantity of interest. Thus, (§ 1,) estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance. (§ 2.) Every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute, or an absolute fee. (§ 3.) All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the 12th day of July, one thou-

sand seven hundred and eighty-two, shall hereafter be adjudged a fee simple ; and if no valid remainder be limited thereon, shall be a fee simple absolute. (§ 4.) Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation, upon a fee, and shall vest in possession on the death of the first taker, without issue living, at the time of such death. (§ 5.) Estates of inheritance and for life shall continue to be denominated estates of freehold ; estates for years shall be chattels real ; and estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on executions. (§ 6.) An estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

The essential characteristics of a freehold estate are 1. *Immobility*, the subject matter must be either in the land, or some interest issuing out of or annexed to land. 2. A sufficient legal *indeterminate duration*, for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold. (2 *Bl. Com.* 386. 1 *Cruise, tit. I, p. 45.*)

Hence, the primary division of freehold estates is into freehold estates of inheritance, and into freehold estates not of inheritance.

SECTION I.

Of freeholds of inheritance—absolute.

Under the New York revised statutes, every freehold of inheritance must either be an estate in *fee simple absolute*, or a *defeasible* or *conditional fee*. Tenant in fee simple is (according to *Littleton*, § 1,) he which hath lands or tenements to hold to him and his heirs forever. An estate in fee simple is the entire and absolute interest and property in the land ; from which it follows that no one can have a greater estate. (1 *Cruise's Dig. p. 59.*) It was essential at common law that the word heirs should be inserted in the conveyance in order to create an estate in fee simple. For if, says *Littleton*, a man purchase by these words, *to have and to hold to him forever* ; or by these words, *to have and to hold to him and his assigns forever* ; in these two cases he hath but an estate for term

of life, for the lack of these words, *his heirs*, which words only make an estate of inheritance. This strictness of the common law has been abrogated in this state. The term heirs, or other words of inheritance have not, since 1830, been requisite to create an estate in fee. On the contrary, every grant or devise of real estate, or any interest therein, executed after the first of January, 1830, is made adequate to pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest appears by express terms, or is necessarily implied in the terms of the grant. And it is made the duty of the courts, in the construction of every instrument creating or conveying, or authorizing the creation or conveyance, of any estate or interest in lands, to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument and is consistent with the rules of law. (1 *R. S.* 748. 3 *id.* 38, §§ 1, 2, 5th ed.)

The great nicety of the common law with respect to the insertion of the word *heirs*, in order to vest a fee, is said to have been a relic of the feudal strictness. (2 *Black. Com.* 107.) It was never required in the transfer of personal property, and the rigor of the rule had been greatly relaxed in the constructions of wills; the courts accepting in lieu of those words, any equivalent expressions, plainly denoting an intention to pass a fee. The statute places deeds, in this respect, upon the same footing as wills, and allows the intention of the parties to be gathered from other language. The change thus introduced into our conveyances had previously been adopted in other states, and it is now a part of the jurisprudence of more than half the states of the union. It is the rule which has always prevailed in the civil law.

An estate in fee simple is the entire and absolute interest and property in the land. Hence it follows that no one can have a greater estate. And he who has granted an estate in fee simple has no farther interest remaining in him. Such an estate, however, may be granted upon condition, and in numerous instances a fee simple may be rendered defeasible on the happening of some future event.

The owner of the fee simple has the entire control, as such, of all houses and other buildings erected on the premises, and of all timber and other trees growing thereon. He is entitled to all mines of metal, except gold and silver, and to dig up and dispose of all minerals and fossils which are under the land. (1 *Cruise's Dig.* 60.)

The right to mines of gold and silver belonged, at common law, to

the sovereign, and in this state, by statute, it is reserved to the people in their right of sovereignty. (*Plowden*, 336. *Seaman v. Vawdrey*, 16 *Vesey*, 393. 1 *Black. Com.* 307. 1 *R. S.* 281, 684, 5th ed.) Numerous questions with respect to the right to mines of the precious metals, have arisen in those states in which those mines are found, but the consideration of them does not seem appropriate to the present treatise. All inferior estates and interests in land are derived out of the fee simple. It is on this ground that when a limited estate vests in the same person who has the fee simple of the same land, the particular estate is merged in the fee, upon the principle that *omne majus continet in se minus*. The doctrine of merger, which will hereafter be considered, has its origin in this principle. (1 *Cruise's Dig.* 61. *Roberts v. Jackson*, 1 *Wend.* 478.)

The power of alienation is an inseparable incident to an estate in fee simple. Hence, any general restriction of this power annexed to the creation of such an estate is absolutely void, and of no effect. (1 *Cruise's Dig.* 63.) In *DePeyster v. Michael*, (2 *Seld.* 467,) the court of appeals held that a reservation, in a conveyance in fee, of a pre-emptive right of purchase by the grantor, his heirs, &c., in every case of sale by the grantee, his heirs or assigns, and the reservation, by the grantor, of a right or portion of the sale money or cash sale by the grantee &c. are void as being repugnant to the estate granted, and illegal restraints upon the power of alienation. By the common law, restraint upon the alienation of lands could only be imposed by persons having the reversion, or at least a possibility of reversion. (*Id.*)

The power of alienation necessarily implies the existence of inferior powers. As the owner may convey the whole, so he may grant out of it, while he is the absolute owner, smaller interests, retaining in himself the reversion. He may thus lease, for a term of years, the whole or any portion of it; he may charge it with debts or legacies, or both; and he may dispose of it by will if he continues the owner till his death. If he fails to make a testamentary disposition of it, by a will executed in conformity to law, it descends to his heirs.

A freehold of inheritance is subject to the dower of the wife, and the curtesy of the husband. These estates will be noticed in their proper places.

This estate also is liable to the debts of the owner on his death, and it may be charged in his will with the payment of debts and legacies, or of either.

It will be more convenient to postpone until we come to treat of deeds and leases, the consideration of the terms by which a fee will pass, and the constitutional restraint imposed upon the granting of farm leases for a longer period than twelve years.

SECTION II.

Of freeholds of inheritance defeasible or conditional.

The revised statutes evidently recognize *defeasible* or *conditional fees* as existing estates.

At common law, estates of inheritance which were not *absolute*, were of two sorts: 1. *Qualified* or *base* fees; and 2d. Fees conditional, so called; and afterwards fees *tail* in consequence of the statute *de donis*. (*Stat. of Westm.* 2. 13 *Edw.* 1.)

At an early day it became customary to make donations of land, restraining them to some particular heirs of the donee, exclusive of others; as to the heirs of a man's body, in exclusion of collateral kindred; or to the heirs male of his body, in exclusion both of collateral heirs, and of lineal female heirs. The strong tendency of the courts to favor the alienation of the estate led them to construe limitations of this kind into estates upon condition, and to apply to them the maxim of the common law that when a condition is once performed, it is thenceforth entirely gone; and the estate to which it was annexed as absolute and unconditional. Upon this mode of reasoning the judges held that these estates were conditional fees, depending upon the leaving heirs of the particular class named in the grant. Hence, it followed that upon the leaving issue born, the estate became absolute, at least so far that the owner could alien the land and thus bar his issue and the donor of his right of reverter, subject the estate to forfeiture for treason, and enable him to charge it with rents and other incumbrances, which would be available against his issue.

This mode of construing conditional fees defeated the object which they were intended to accomplish. This induced the nobility, who were desirous of perpetuating their possession in their own families to procure the enactment of the *Statute of West.* 2, 13 *Edw.* 1, before adverted to, and which is usually called the statute *de donis*, requiring "the will of the giver, according to the form of the deed of gift manifestly expressed, to be observed, so that they to whom a tenement was so given under a condition should not have power to

alien the same tenement, whereby it should not remain after the death of the donees, to their issue, or to the donor or his heirs if issue failed." This statute, as was observed by Lord Mansfield, in his elaborate opinion in *Taylor v. Horde*, (1 Burr. 60, 115,) only repeated what the law of tenure said before, that "the tenor of the grant should be observed." It rejected the erroneous opinion which had been expressed by the judges that a donation of this kind created a conditional fee; and declared that it vested an estate of inheritance in the donee, and some particular heirs of his, to whom it must descend notwithstanding any act of the ancestor, and that the estate of the donor is a reversion expectant on the determination of that estate. (*Id.*)

An *estate tail* may be described to be an estate of inheritance, deriving its existence from the statute *de donis*, which is descendible to some particular heir only of the person to whom it is granted, and not to his heirs general. It was of two kinds; tenant in tail general and tenant in tail special. The first was when lands were given, to a man and the heirs of his body, without any further restriction; and the second when the gift was restrained to certain heirs of the donee's body, exclusive of others, as when lands are given to a man and the heirs of his body, on Elizabeth his present wife, to be begotten. Thus also, the estate might be limited to the heirs male of the body of the donee, which was called an estate in *tail male*, or to the heirs female of his body, called an estate in *tail female*.

In all cases of entailment limiting the lands to a particular class of heirs, no descendant of the donee could inherit unless he could deduce his title through that particular class of heirs to which the succession of the land was limited.

This species of estate was only predicable of what partook of the *nature of real property*, whether corporeal or incorporeal. It was subject to many of the incidents of estates in fee simple absolute. The tenant had a right to commit every kind of waste. The estate was *subject to the curtesy* of the husband, and *the dower* of the wife. The estate might, at common law, be discontinued by five different modes of conveyance; and it might be barred by a common recovery.

This species of estate was not uncommon in this state before and after the revolution until it was abolished in 1782. The act of 1786, (1 *Greenl.* 205,) while it abolished that estate, enacted "that when any person now is or are, or would but for the act of 1782

therein repealed, be now seised in fee tail of any lands, tenements or hereditaments, such person shall be now deemed to be seised of the same in fee simple absolute." These two statutes, to wit, of 1782 and 1786, operated as well upon vested remainders in tail as upon estates tail which had taken effect in possession. (*Vanderheyden v. Crandall*, 2 *Denio*, 9, *affirmed* 1 *Comst.* 491. *Van Rensselaer v. Poucher*, 5 *Den.* 35.) The provision in the revised statutes (1 *R. S.* 722, § 3) which declares that every estate which would be adjudged a fee tail before the statutes abolishing entails, shall hereafter be adjudged a fee simple, is not more comprehensive in its effects than the former statutes, but is simply declaratory of the then existing law. (*Van Rensselaer v. Poucher*, *supra*.)

But estates in fee tail having been so long abolished, are of little interest to the reader. In this state and probably in others, they are converted into estates in fee simple absolute, and the learning concerning them is of little practical value. In some states, they never formed a part of their jurisprudence. The prevailing opinion in this country is adverse to the policy which entailments are calculated to cherish. The free and unrestricted alienation of property is, on the whole, more conducive to the advancement of society, than the accumulation of large masses in the hands of a favored few.

There are some defeasible and conditional estates in fee, which have not been abrogated by the revised statutes. A limitation to a man and his heirs so long as he shall have issue of his body; or till a person at Rome shall return from Rome, or till a person shall go to Rome; or during the time while a particular tree shall stand, or till default shall be made in the payment of his debts, or so long as St. Paul's Church shall stand, are instances of this species of estate. (1 *Preston on Estates*, 432 *et seq.*) Even in wills it is said that a devise to a man and his heirs, till debts are paid, passes the fee, and not a chattel interest, except under special circumstances.

These estates are of rare occurrence, except in the case of securities by way of mortgage, which will be treated of in a subsequent part of this essay.

As no one can transfer to another a greater estate than he himself possesses in the subject of the grant, the owner of a determinable fee cannot, by a conveyance thereof to a man and his heirs generally, without restriction, enlarge the determinable fee into a fee simple. The grantee would take only such estate as the grantor, at the time

of the conveyance, enjoyed. (1 R. S. 739, § 143. *Sage v. Cartwright*, 5 Seld. 52.)

A determinable fee may become absolute and simple without any further conveyance. Should an estate be limited to A. and his heirs until the marriage of B., and B. should die unmarried, the estate in A. would become an estate in fee simple absolute. The event on which the determination of the estate depended, having become impossible by the act of God, viz., the death of B. before marriage, the period for the determination of the estate can never arise. For that reason the estate will last forever, in the same manner, as if no collateral limitation had given to it a determinable quality.

The foregoing observation is referable only to a class of cases in which the event on which the estate is limited, may become impossible, and therefore can never happen. It does not apply to those cases where, as in the case of an estate until a tree shall fall, an event is fixed as the termination of the estate, which must happen some time or other in the course of nature. In this latter case, the reversion or remainder expectant on the estate, or the possibility of reversion which is left in the grantor, may, by a release or other proper assurance, be conveyed to the owner of the determinable fee, and thus make him the owner of a fee simple absolute.

The conditional fees at the common law, as they existed prior to the statute *de donis*, have in general shared the fate of estates in fee tail, and are scarcely known in our jurisprudence. They have been succeeded by executory limitations which will hereafter be noticed. The revised statutes have enacted that every person holding lands (except idiots, persons of unsound mind and infants) seised of or entitled to any interest in lands, may alien such estate or interest at his pleasure, with the effect and subject to the restriction and regulations provided by law. (1 R. S. 719, § 10. *DePeyster v. Michael*, 2 Seld. 467. *The Albany Ins. Co. v. Bay*, 4 Comst. 9. 1 R. L. 70, § 1. *Id.* 74, § 5.)

SECTION III.

Of freeholds not of inheritance.

Under the definition of the term freehold estate, in a preceding page, (p. 115,) an estate for life in lands is a freehold interest. It is of two sorts, 1, such as is created expressly by deed or other legal assurance, and 2, such as is derived from the operation of law. Un-

der the first head are 1st, an estate for the life of the tenant, and 2d, an estate for the life of another person, or persons. Under the second general head are embraced, 1st, an estate by the curtesy of England, and 2d, an estate in dower.

We shall treat of these different estates in the present section.

1. *Of an estate for the life of the tenant created by the act of the parties.* This estate is created when a deed of land is given to a man in express terms for the term of his life. At common law a grant of land to a man forever, conveyed only a life interest, if the word "heirs" was omitted. (*Litt. lib.* 1, § 1.) But since the revised statutes have dispensed with the term "heirs" and permitted the intention to pass a fee to be gathered from the language of the instrument, (1 *R. S.* 748,) it is necessary, in order to create an estate for the life of the grantee, that the intention to create such estate should be expressed in the conveyance.

Formerly, such an estate might be created whenever the grantor was the owner of the fee simple. But now, by the constitution of 1846, article 1, § 14, it is provided that no lease or grant of agricultural land for a longer period than twelve years thereafter made, in which shall be reserved any rent or service of any kind, shall be valid. This provision owed its origin to the antirent excitement which at that period prevailed to a great extent in certain parts of the state, and the object was to prevent long terms of farm leases, reserving rent, from being made. The prohibition does not apply to *urban* property, but to that which is strictly agricultural; and it does not apply to the latter, if no rent or other service is reserved in the conveyance.

In general, this species of estate for life will endure as long as the life or lives for which it was granted. There are some exceptions to this rule. Thus it may be determinable upon an event which happens before the death of tenant for life. Thus an estate to a woman so long as she remains unmarried, or to a man and woman during coverture, or so long as the grantee shall dwell in a particular house, are estates for the life of the grantee, but are determinable on the happening of these events. (1 *Inst.* 42.) Hence, in the above cases, if the woman marries, or the coverture ceases by death or otherwise, or the grantee ceases to dwell in the particular house, the life estate of the grantee terminates before his death. (*Id.*)

An estate for one's own life is of more value than an estate for the

life of another. A tenant for life may alien his estate, but his grantee then becomes a tenant for the life of his grantor. This results from the principle that no man can grant a greater estate than he possesses; and as he has an estate only for his own life, his grantee becomes the tenant *pur auter vie*.

As the incidents of a tenancy for life are substantially the same in all cases, we shall postpone an enumeration of them to the close of this section.

2. *Of the estate for the life of another, usually denominated an estate pur auter vie.* This estate is at common law an estate of freehold. It may be created by express words of limitation, or by the alienation by a tenant for his own life. The incidents of this estate are the same as those of other life estates, and will be hereafter noticed. By the revised statutes, in the chapter in relation to wills and testaments, and of the distribution of the estates of deceased persons, and of the rights, powers and duties of executors and administrators, estates held by the deceased for the life of another person are declared to be assets, and directed to go to the executors or administrators to be applied and distributed as part of the personal estate of the testator or intestate, and to be included in the inventory thereof. (2 R. S. 82.) An estate during the life of a third person, whether limited to heirs or not, is deemed a freehold only during the life of the grantee or devisee, but after his death, a chattel real. (1 R. S. 722, § 5. *Roseboom v. Van Vechten*, 5 Denio, 414.)

A lease granted by the tenant *pur auter vie*, will cease on the death of the *cestui que vie*, and not on his own death.

At common law, where lands were given to A. for the life of B., if A. or his assignee happened to die in B.'s lifetime, the estate belonged to the first person who took possession, whoever he might be; and such person was called an occupant. But if the gift were to A. and his heirs for the life of B., or if A. in the former case had assigned his estate to another person and his heirs, this title by occupancy was precluded. The heir indeed who succeeded to such an estate was commonly called a special occupant. The statute 29 Charles 2, ch. 3, § 12, declares those estates *pur auter vie* to which the heir does not succeed as special occupant to be assets. If the heir took as special occupant then they became assets in his hands. Our former statute concerning wills (1 R. L. 365, § 4) made no such

exception, but allowed the estate to be *devisable* by last will and testament; and if no such *devise thereof was made*, the same or so much thereof as was not devised was directed to go to the executor or administrator, of the party who had the estate, to be applied and distributed as part of the personal estate. Such was the law prior to the revised statutes of 1830; and by the latter, the estate was made assets in the hands of the executor or administrator, *whether devised by the testator or not*. (2 R. S. 82, § 6, *subd.* 1. *Roseboom v. Van Vechten*, *supra*.)

3. *The third species of estate for life is an estate by the curtesy.* It is thus described by Littleton, § 35: "When a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in special tail and hath issue by the same wife, male or female born alive; albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England." The conversion in this state of estates in fee tail into estates in fee simple, modifies, but does not impair, the above definition. Although this estate has not been, like the estate in dower, declared by statute, it has been repeatedly recognized by the courts of this state as an existing estate. (*Jackson v. Johnson*, 5 Cowen, 74-95. *Dunscomb v. Dunscomb's Executors*, 1 John. Ch. R. 508. *Jackson v. Sellick*, 8 John. Rep. 262. *Jackson v. Gilchrist*, 15 *id.* 89. *Adair v. Lott*, 3 Hill, 182. *Ellsworth v. Cook*, 8 Paige, 643. *Matter of Cregier*, 1 Barb. Ch. R. 598. *Schermerhorn v. Miller*, 2 Cowen, 439. *Jackson v. Mancius*, 2 Wend, 357. 1 R. S. 754, § 20.)

The supreme court at an early day recognized Littleton's description of the estate, by which it appears that four things belong to the estate, viz. marriage, seisin of the wife, issue and death of the wife. They admit that it is not necessary that all these should concur together at one and the same time; and therefore if a man taketh a woman seised of lands in fee and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he hath issue which dieth before the descent. (*Jackson v. Johnson*, 5 Cowen, 95.)

The marriage must be a legal, valid marriage, between parties able to enter into the contract. The seisin required by the English books, must be a seisin in deed. (1 *Inst.* 29 *a.*) But the courts of this state have held that when a feme covert is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed so

as to enable her husband to become a tenant by the curtesy. An actual entry or *pedis possessio* by the wife or husband during the coverture, is not requisite to the completion of a tenancy by the curtesy. (*Jackson v. Sellick*, 8 John. 262. *Same v. Gilchrist*, 15 *id.* 89.) The time when the seisin commences, whether upon or after issue had, is immaterial; for if a man marries a woman seised in fee, is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands on the wife. (1 *Inst.* 30 a.) The issue must be born alive in the lifetime of the wife; and therefore if she dies in childbed, and the issue is taken out of the womb by the Cæsarean operation, the husband will not be entitled to curtesy. (*Per Walworth, Ch., Marsellis v. Thalhimer*, 2 Paige, 35. 1 *Cruise Dig.* 152, *Greenl. ed.*) The last circumstance required to give a title to curtesy is the death of the wife, by which the estate of the husband becomes consummate. (1 *Inst.* 30, a.)

With regard to the persons capable of acquiring this estate, it is sufficient to observe that all persons capable of taking a freehold estate may be tenants by the curtesy.

There is some conflict in the decisions of our courts with regard to the effect which the statutes relative to the estates of married women have on the curtesy of the husband, and therefore a few remarks will be added. The act of 1848, ch. 200, p. 307, enacts that "the real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor be liable for his debts, and shall continue her sole and separate property as if she were a single woman." The second section applies the same principle to females who were married at the time of the passing of the act. The third section as amended by the law of 1849, ch. 375, p. 528, enacts that any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same shall not be subject to the disposal of the husband nor be liable for his debts.

A learned judge of the supreme court of the first district, in 1854, intimated at special term that the effect of the foregoing

statutes was to deprive the husband of curtesy in the land of the wife. (*Benedict v. Seymour*, 11 How. 179.) This intimation is elaborately reasoned out by another learned judge (Potter) in *Billings v. Baker*, (28 Barb. 343,) decided at general term in the 4th district in 1859, and a majority of that court held that the effect of those statutes was entirely to abrogate the existence of prospective tenancy by the curtesy; and in short that every quality and incident that are necessary to constitute a tenancy by the curtesy are destroyed by the provisions of these acts. (*S. C.* 15 How. 525.) But the doctrine of this case was strongly questioned by the learned judge (Sutherland) who delivered the opinion of the general term of the supreme court in the 1st district, in the same year, in *Vallance v. Bausch*, (28 Barb. 633, 642.) And the supreme court in special term in the 6th district in 1850, held expressly that the husband's estate by the curtesy was not taken away by those statutes in the lands of which the wife died seised; and this doctrine was concurred in by a learned justice in the 8th district at special term, in 1857, in *Clark v. Clark*, (24 Barb. 581.) The court, speaking of cases where the wife took the estate during coverture, thought that if she failed to convey or devise the land, and thus died seised, the husband would be entitled to curtesy as before the passage of those laws. If the wife was seised of the land *before* coverture, the statutes afford no ground to suppose that the husband's right to curtesy is impaired. It is only with respect to lands which she acquires during coverture by inheritance, gift, grant or devise, that there is any color for supposing that the husband's right to curtesy is taken away. The weight of authority at present is against the position that curtesy is taken away by those statutes. We cannot speak decisively upon the subject until the question shall have been definitively settled by the court of appeals. The protection of the rights of married women does not require that the right of the husband to curtesy—an estate which is only consummated by the death of the wife—should be abrogated. Had the legislature intended a change so radical, they would have, doubtless, expressed it in unequivocal language. The claim to curtesy, like the claim to dower by the wife, springs out of the positive institutions of society, which may, indeed, be changed or destroyed in both cases according to the dictates of justice and public policy. The legislature might well secure the real estate of the wife during her lifetime, whether owned by her before marriage, or derived by her afterwards by inheritance, gift or

devise, from the control of her husband during her life. They have done it only in a qualified manner, in regard to property acquired after the marriage, but have been silent as to its effect upon the common law rights of the husband, on her death. Those rights remain in full vigor.

The statute relative to titles to real property by descent directs the mode of its disposition on the death intestate of the owner, and but for the 20th section would abrogate both the estates of dower and curtesy. (1 *R. S.* 744.) But the acts of 1848 and 1849, relative to the estates of married women, have reference to her property *during her life*. They unquestionably lessen the common law marital rights of the husband, during the existence of the marriage, but they do not impair his rights upon her death, if she fails to exercise the powers with which she is clothed.

It is the seisin of the wife, in her lifetime, and not that of the husband, that gives the right to curtesy. (*Pond v. Bergh*, 10 *Paige*, 140.) The foregoing decisions were made before the act of 1860, chap. 90, the effect of which upon dower and curtesy has not yet been adjudicated.

4. *The remaining life estate of which we shall treat in this section is dower.* This estate is derived from the law, and is that which a widow acquires in a certain portion of her husband's real property, after his death, for her support and maintenance. In this state the general principles, with respect to this right, are set forth in the revised statutes. It is there enacted that a widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance, at any time during the marriage. (1 *R. S.* 740, § 1.) This is substantially as the estate is described by Littleton, § 36. In most of the United States the right of the wife to dower is the same in substance as stated by Littleton. In some of the states, the right to dower is restricted to those lands of which the husband *died* seised. Under such a limitation of the right it is unnecessary for the wife to join in the conveyance of her husband on sales of his real estate in order to extinguish her claim. The inchoate right to dower is, in this state, an incumbrance upon the estate of her husband, which is usually removed by her uniting with him in the deed, and acknowledging the execution thereof, on a private examination before a proper officer.

With regard to the person entitled to dower, it has been seen that

it is the widow only of the party seised during the coverture of an estate of inheritance. It is no objection that her husband was an alien, if at the time of his death he was by law entitled to hold real estate, provided she be an inhabitant of this state at the time of such death. (*Laws of 1845, ch. 115, § 2. 3 R. S. 7, 5th ed. Id. 31, § 2.*) Nor is her own alienage a bar, provided her husband is a citizen of the United States at the time of her marriage. (*Laws of 1845, ch. 115, § 3. 3 R. S. 7, 5th ed.*)

The circumstances requisite to create dower are marriage, seisin of the husband and death of the husband.

The marriage must be a legal one. If it be merely *voidable*, yet if it be not avoided in the lifetime of the parties, it cannot be annulled afterwards. The husband must be *seised* during the coverture of a present freehold estate of inheritance. A seisin of a vested remainder is not sufficient where the husband dies or aliens his interest in the premises during the continuance of the particular estate. (*Dunham v. Osborn, 1 Paige, 634. Green v. Putnam, 1 Barb. S. C. R. 500.*) A seisin in law, will be as effectual as an actual seisin. (*2 Bl. Com. 131. Clancy's Rights of Women, 198.*)

But when the seisin is instantaneous or passes from him the instant it is acquired; as when he delivers a mortgage for the purchase money on the receipt of a conveyance, his widow is not entitled to dower as against the mortgagee or those claiming under him, although she shall not have united with him in the mortgage; but she is entitled to her dower as against all other persons. (*1 R. S. 740, §§ 4, 5. Stow v. Tift, 15 John. 458. Jackson v. De Witt, 6 Cowen, 316.*) But the mortgage so given by the husband or by him and his wife, to secure the purchase money of the mortgaged premises, cannot, after having been satisfied and discharged of record, be set up by the assignee of the husband as a bar to his widow's right of dower. (*Runyan v. Stewart, 12 Barb. 537.*)

The widow is not dowable of her husband's estate for the life of another. (*Gillis v. Brown, 5 Cowen, 388.*)

So if a husband be seised of a conditional estate, and the grantor enters for condition broken, the wife is divested of all claim of dower. (*Beardslee v. Beardslee, 5 Barb. 324.*)

As to mines in general, including beds of iron ore, if they are unopened at the owner's death, his widow must take her dower in other land merely. The newly opening of a mine is waste, and the widow, being tenant for life can legally do no act which injures the

inheritance. But if mines be opened during the husband's life, dower in them is properly assignable; but she cannot profit by any extension of that opening. The admeasurer, it seems, should take into consideration the value of the mine, so far as it was opened, during the husband's life, and assign the dower, either by measuring off one third in value, or specifically assigning a reasonable share of the profits at short periods. (*Coates v. Cheever*, 1 Cowen, 460.)

The maxim *dos de dote peti non debet* is not of universal application. Thus, if the father die, and the land descends to his son and heir, subject to the dower of the mother, and dower is assigned to her in the premises, and the son dies during the continuance of her estate, the widow of the son will be entitled to dower in the remaining two thirds; but will not be entitled to dower in the reversion of that part which was assigned to the mother as tenant in dower. Here the maxim applies. As to that part, the moment the mother is endowed, her seisin relates back to the death of the husband, and is considered a continuance of his seisin, so that there never was any seisin in the son. But the case is different where the father *conveys* to his son. By the conveyance, the son becomes seised of the whole premises subject to the dower right of his mother if she survives the grantor; and the wife of the grantee is entitled to dower in the whole subject to the same right. (*Dunham v. Osborn*, 1 Paige, 634.)

Two widows cannot be endowed of the whole estate at the same time. If the land descends to the son, subject to his mother's dower, he is not seised of the third assigned to her during her life; and if he die, living the mother, his widow can be endowed only of the two-thirds, and not of the third assigned to the mother, nor of the reversion thereof. (*Safford v. Safford*, 7 Paige, 259. *Reynolds v. Reynolds*, 5 id. 161. *Matter of Cregier*, 1 Barb. Ch. 599.) In *Bear v. Snyder*, (11 Wend. 592,) the chief justice overlooked the distinction between an estate which comes to the husband by purchase subject to the contingent right of dower of the wife of the grantor in case she survives him, and an estate by descent which the heir takes at law subject to the present right of dower of the widow of the deceased. (*Per Walworth*, *In the matter of Cregier*, *supra*.)

The wife of the mortgagor is entitled to dower out of the lands mortgaged against all but the mortgagee. This is not only the language of the statute, but results from the principle adopted by our

courts, that the mortgage before foreclosure is not regarded as the legal title which a stranger can set up. The legal estate is still in the mortgagor, and can be sold on execution against him. (*Collins v. Torry*, 7 *John.* 278. *Coles v. Coles*, 15 *id.* 319. *Hitchcock v. Harrington*, 6 *id.* 290. *Van Dwyne v. Thayre*, 14 *Wend.* 233. 19 *id.* 162, 168.)

Courts of equity follow the law in cases of this kind, and hold that the widow of the mortgagor, who dies in possession and before foreclosure, is entitled to dower in the mortgaged premises, and will allow her dower out of the proceeds of the sale of the mortgaged premises on a bill for a foreclosure and sale. (*Titus v. Neilson*, 5 *John. Ch. R.* 452.)

The object of uniting the wife with the husband in his conveyance of land to a third person, is to extinguish her inchoate right of dower, and thus render the title perfect. Her uniting with him in a mortgage has the same effect as between her and the mortgagor. It is equitable that she should take dower in the equity of redemption, if the land was of more value than the sum charged upon it by the mortgage. If, therefore, the land be sold on foreclosure, she is not entitled to be endowed of the whole proceeds, but only of what remains after paying the mortgage debt and costs of foreclosure; but her third of such surplus is not chargeable with any part of the costs of the reference to ascertain her rights. (*Hawley v. Bradford*, 9 *Paige*, 200. *Titus v. Neilson*, *supra*.)

It was held by the chancellor, in *Carson v. Murray*, (3 *Paige*, 483,) that the wife cannot execute a valid release of dower, in any other way than by joining with her husband in a conveyance to a third person. A release of dower, therefore, contained in a deed of separation, by which a provision was made for her, was held not to be a legal bar.

But if the wife be an infant she is not barred of her dower by uniting in the conveyance with her husband. (*Priest v. Cummings*, 16 *Wend.* 617; *S. C.* 20 *id.* 338. *Sanford v. M'Lean*, 3 *Paige*, 117. *Cunningham v. Smith*, 1 *Barb.* 399.)

In the case of the exchange of lands by the husband for other lands, the widow cannot have dower in both, though her husband was seised of both, but she must make her election to be endowed of the lands given, or of those taken in exchange; and if such election be not evinced by the commencement of proceedings to recover

her dower of the lands given in exchange, within one year after the death of the husband, she shall be deemed to have elected to take her dower of the lands received in exchange. (1 *R. S.* 740, § 3.)

The term *exchange* in the statute, has been held by the supreme court to have been used in its legal meaning, which is understood to be "a mutual grant of equal interests, the one in consideration of the other." The estates exchanged must be equal in *quantity*; not of *value*, for that is immaterial; but of *interest*, as fee simple for fee simple, a lease for twenty years for a lease for twenty years. (2 *Bl. Com.* 323. *Wilcox v. Randall*, 7 *Barb.* 638. 1 *Hill. Abr.* 77, § 8. 1 *Cruise*, 179, § 12, *Greenl. ed.* *Clancy*, 198.) The statute above referred to is not introductory of any new rule except as to the limitation of the time within which the widow must elect in which lands to claim her dower, and on failure so to elect, restricting her claim to be endowed only in the lands received in exchange.

A widow of a trustee is not dowerable of the trust estate. (*Cooper v. Whitney*, 3 *Hill*, 95. *Germand v. Jones*, 2 *id.* 573.) Nor of a power in trust. (*Id.*) Nor is she entitled to dower of an estate held by her husband in joint tenancy, since in such estate the inheritance is not executed in possession, on account of the right of survivorship. (*Wharton's Conveyancing*, 56. *Clancy*, 199.)

As a legal marriage is essential to dower, it follows that if a divorce *a vinculo matrimonii* be granted for a cause rendering the marriage void *ab initio*, there can be no dower. In this state the supreme court is authorized, by a sentence of nullity, to declare void the marriage contract, for either of the following causes, existing at the time of the marriage: (1.) That the parties, or one of them, had not attained the age of legal consent, (12 in females and 14 in males;) (2.) That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force; (3.) That one of the parties was an idiot or lunatic; (4.) That the consent of one of the parties was obtained by force or fraud; (5.) That one of the parties was physically incapable of entering into the married state. (2 *R. S.* 142, § 20.)

By a subsequent statute (*L. of 1841, ch. 257*) the court is likewise empowered, by a sentence of nullity, to declare void any marriage contract, upon evidence, (1) that the female was at the time of the alleged marriage under the age of fourteen years, and that such mar-

riage was without the consent of her father, mother, guardian or other person having the legal charge of her person, and was an offense on the part of the husband, under the statute, and punishable according to law; (2) that the marriage was not followed by consummation or cohabitation, and not ratified by any mutual assent of the parties after the female had attained the age of fourteen years.

A decree of nullity would doubtless be a good bar to a claim for dower. (*Bennett v. Smith*, 21 Barb. 440. *Wait v. Wait*, 4 Comst. 95; *S. C.* 4 Barb. 192-210.)

But when the divorce is obtained by the wife for the adultery of the husband, she being the innocent and he the guilty party, she is still entitled to dower in lands of which he was seised prior to the divorce. A divorce or separation, *a mensa et thoro*, does not defeat the right to dower in lands of the husband whereof he was seised before the granting of the decree. (*Wait v. Wait*, *supra*.)

There are several modes in which the right to dower may be barred. The joining of the wife in the conveyance of her husband of his lands is not strictly a bar, but prevents the estate in dower from attaching in the wife. It operates as a release of her inchoate right of dower which the statute authorizes her to execute.

Dower may be barred by a jointure. In this state it is enacted that whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust, for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent, such jointure shall be a bar to any right or claim of dower of such wife, in any lands of the husband. (1 R. S. 741, § 9.) The assent of the wife to such jointure must be evidenced, if she be of full age, by her becoming a party to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian in such conveyance. (*Id.* § 10. *McCartee v. Teller*, 2 Paige, 559.)

Under the two maxims of the common law, namely, that no right could be barred until it had accrued, and that no title to a freehold estate could be barred by a collateral satisfaction, it was found impossible to bar a woman of dower by any assurance of lands either before or during the marriage. This led to the insertion in the statutes of uses of a suitable provision for this purpose and which is the origin of the modern jointure, which Lord Coke defines to be a competent livelihood of freehold for the wife, of lands or ten-

ements, &c. to take effect presently in possession, after the decease of her husband, for the life of the wife at the least, if she herself be not the cause of its determination or forfeiture. (1 *Inst.* 37 a. 1 *Cruise's Dig.* 213, *Greenl. ed.*)

In the case of *Tinney v. Tinney*, (3 *Atkins*, 8,) a sum of money secured by bond to the intended wife, before the marriage, was held to be a bar to dower. And in a case published by Mr. Cox, where the intended husband gave a bond to the mother of the intended wife, conditioned that he or his heirs would settle £500 a year in land on her, in satisfaction of dower; Sir T. Clarke, M. R. held it a good jointure. From which it appears that the courts of equity now consider any provision which a woman accepts before marriage in satisfaction of dower, to be a good jointure. (1 *Cruise's Dig.* 216, *Greenl. ed.*)

The statute being in contradiction to the common law, was always construed strictly, and Lord Coke laid it down that the estate limited to the woman would not be deemed a good jointure and a bar to dower, unless it was made to commence and take effect immediately on the death of the husband; that it be for the life of the wife at the least; that it be limited to the wife herself, and not to any other in trust for her; that it be made in satisfaction of the wife's whole dower; that it be expressed or averred to be in satisfaction of her whole dower; and that it be made *before* marriage. There were other estates limited to a wife which were good jointures within the statute, provided she accepted them after the death of the husband. (1 *Cruise's Dig.* 215, 217, *Greenl. ed.*)

The New York statute is an improvement of the statute of uses in pointing out the mode in which the assent of the intended wife is to be manifested, and in providing suitable guards for the protection of infants. It also allows it to be made to another in trust for the intended wife.

The sections already quoted refer to a jointure in an *estate in lands*. The 11th and 12th sections of the same act declare that any pecuniary provision that shall be made for the benefit of the intended wife and in lieu of dower, shall if assented to by such intended wife, as above provided, be a bar to any right or claim of dower of such wife in all the lands of her husband.

Also, if before her coverture, but without her assent, or if, after her coverture, lands shall be given or assured for the jointure of a

wife, or a pecuniary provision be made for her in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both. (1 R. S. 741, §§ 11, 12.) [See Appendix.]

Our statute on this subject was derived from the 27th Henry 8th, ch. 10, § 6, with some modifications. Under the English statutes there were said to be two kinds of jointures within its provisions. One which prevented the dower from accruing; another, which when *accepted* but not before, becomes a bar to dower. (1 *Cruise*, 218, *Greenl. ed.*)

The question how far a testamentary provision in favor of the wife will bar her claim to dower, has often been the subject of judicial exposition. In *Bull and wife v. Church*, (5 *Hill*, 206,) the testator, by his will, devised all his property, real and personal, to his wife during her natural life, *or as long as she should remain his widow*. After her death, or if she should marry again, he gave all his property, real and personal, to his three sons. On the death of the husband the wife took possession and occupied the property for several years and then married the plaintiff. The question was whether her acceptance was a collateral satisfaction of her dower. The court held that it was not. Dower, it was said, is a legal right over which the husband has no direct control. It was admitted that he might offer something else in lieu of it, which if accepted, would be a bar.

The general principle was stated to be that a testamentary provision for the wife is deemed a gratuity or a benevolence, which she may take in addition to her dower, unless the testator has plainly manifested a different intention, as by saying that the gift is in lieu or bar of dower. Express words will not, however, be necessary, if the claim of dower is so utterly inconsistent with the terms of the will, that the widow cannot have both gift and dower without breaking up the testator's plan of disposing of his estate. In such a case she may be put to her election. This case was affirmed by the court of errors. The chancellor in delivering their judgment said that the right of dower being a legal right, and favored by the courts, cannot be barred by a testamentary provision in her favor, in the nature of a jointure, so as to put her to her election, unless the testator declares the same to be in lieu of dower,

either in express words or by necessary implication. After referring to *Fuller v. Yates*, (8 *Paige*, 325,) and *Sandford v. Jackson*, (10 *id.* 266,) he stated the settled rule of law to be, that to compel the widow to elect between the dower and a provision made for her in the will, where the testator had not in terms declared his intention on the subject, it was not sufficient that the will rendered it doubtful whether he intended that she should have her dower in addition to that provision; but that to deprive her of dower the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which it is claimed; so that the intention of the testator in relation to some part of the property devised to others would be defeated if such claim was allowed. (*Church v. Bull and wife*, 2 *Denio*, 430.)

The intention of the testator in such cases is to be gathered from the will itself, and not from his oral declarations, or other extrinsic acts.

When the testamentary provision in favor of the widow is not stated to be in lieu of dower, and is not inconsistent with her claim, and is of shorter continuance than her estate of dower and is charged with a burden, indefinite in its nature and extent, no implication can be raised against the validity of her claim. (*Lasher v. Lasher*, 13 *Barb.* 106. *Leonard v. Steele*, 4 *id.* 20.)

Courts of law as well as courts of equity hold the widow to elect between her dower and a legacy given in lieu of it. (*Van Orden v. Van Orden*, 10 *John.* 30. *Kennedy v. Mills*, 13 *Wend.* 553.) But to constitute a case for election under the statute, the provision in lieu of dower must be one in which she is to have some beneficial interest. A mere power in trust for the benefit of others is not sufficient, though the interest of the *cestui que trust* may be made dependent upon her election to take a provision in lieu of dower. (*Hawley v. James*, 5 *Paige*, 318.)

The interest of a mortgagee before foreclosure, though the mortgage be in fee, is not such a seisin as to entitle the wife of the mortgagee to dower therein, unless he acquires an absolute estate therein during the marriage. (1 *R. S.* 741, § 7.)

In cases where the wife is entitled to an election under the 12th and 13th sections of the statute before cited, (1 *R. S.* 741,) it is declared that she shall be deemed to have elected to take her jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for

her dower, or commence proceedings for the recovery or assignment thereof. (*Id.* § 14.)

With regard to the forfeiture of dower it is enacted that, in case of a divorce, dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed. (1 *R. S.* 745, § 8.) The statute is indefinite as to the nature of the misconduct that shall work out that consequence. If we construe it with the provision relative to divorces, it probably means the adultery of the wife, established and declared in an action by the husband for a divorce for such adultery. Such a divorce, it has been seen, does not avoid the marriage from the beginning, and therefore, but for this statute, would not impair her claim to dower. (2 *R. S.* 146, § 48. *Wait v. Wait*, 4 *Comst.* 95.) It is perhaps unfortunate that the *particular* misconduct has not been designated.

In *Reynolds v. Reynolds*, (24 *Wend.* 193,) the supreme court decided in 1840, that since the revision of 1830, when a husband dies, his widow is entitled to dower in the lands whereof he was seised, notwithstanding that previous to 1830, for many years she lived in open adultery away from him, *if a divorce was not obtained*. Had the husband died previous to 1830, she would have been barred under the former act concerning dower, (1 *R. L.* 58,) passed in 1787, notwithstanding a divorce had not been obtained; but that act having been repealed, the widow, by the revised statutes, is not barred, unless the marriage contract has been dissolved by a divorce. Previous to the death of the husband, the wife had no right, interest or estate in the lands of her husband which could be forfeited by the adultery, and therefore the act of 1787 had no operation in barring her dower.

As to elopement, this was no bar of dower at the common law, though a divorce were sued and obtained for the adultery; but the statute of Westminster, 2d ch. 34, re-enacted in this state in 1787, (1 *R. L.* 58, § 7,) expressly provides that in such a case the wife shall lose her dower; and though she did not go away voluntarily, but was taken against her will, yet, if after she consented and remained with the adulterer, she lost her dower; for the remaining with him without reconciliation was the bar of dower, and not the manner of going away. (*Bacon's Abr. tit. Dower, F.* 2 *Inst.* 435.) The present law places the bar on the ground of adultery on the divorce obtained for that cause.

If the wife forfeits her dower on a conviction for adultery in an action brought by the husband for a divorce, it would seem just that the same consequences should follow with respect to her jointure, or any testamentary provision made in her favor in lieu of dower. It is accordingly enacted that every jointure, devise, and every pecuniary provision in lieu of dower shall be forfeited by the woman for whose benefit it shall be made, in the same cases in which she would forfeit her dower; and upon such forfeiture, any estate so conveyed for jointure, and every pecuniary provision so made, shall immediately vest in the person or his legal representatives, in whom they would have vested on the determination of her interest therein, by the death of such woman. (1 R. S. 742, § 15.)

We have hitherto been considering cases in which the husband was seised of an estate in fee simple absolute. But the wife is entitled to dower where the husband was seised of a defeasible or conditional estate of freehold of inheritance. If land be granted to a man and his heirs until the happening of a future event, the widow is entitled to dower therein on surviving her husband, but her dower will be defeated on the happening of the event upon which the estate is limited. Her dower is likewise liable to be defeated by any claim or incumbrance overreaching his title, and by which his estate might be destroyed.

There is also another class of cases in which courts of equity will uphold the claim to dower, which could not be reached by the strict rules of the common law. It is a maxim of equity that money agreed to be turned into land is to be considered as land. What has been lawfully agreed to be done is, in that court, treated as done. Hence in cases of that nature the widow would be entitled, in a court of equity, to the same interest in the money, that would belong to her in the land, if the conversion of the fund had actually taken place. The widow is now dowable of land which the husband had fully paid for, but of which he had received no conveyance. (*Hawley v. James*, 5 Paige, 318, 453.) So she is dowable of land for which he had paid, and the deed of which had been taken in the name of another. (*Id.*; S. C. 16 Wend. 61.)

We have seen by the definition of the estate in dower, that the wife is entitled to be endowed of all the lands whereof the husband was seised of a freehold estate of inheritance *at any time during the*

coverture. It is not essential that his seisin should have continued till his death, although it is necessary that the *marriage* should have remained undissolved until that time.

To protect the rights of the wife in this respect, which have always been favored in law, it is wisely declared that no act, deed or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed or recovered against him, and no laches, default, covin or crime of the husband shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto. (1 *R. S.* 742, § 16.)

It would, however, be manifestly unjust in case of the alienation of the lands by the husband during the *coverture* to allow the wife, after the death of her husband, to recover dower upon the same principles as if her husband had died seised. The effect of such recovery would be to give her the avails of the labors of the alienee of her husband, who may have been a purchaser in good faith, and whose equity is stronger than her's. The policy of such claim would be of injurious tendency, as it would repress the spirit of improvement. Accordingly the ancient common law required the widow to take her dower in the land according to the value at the time of the alienation. (*Humphrey v. Phinney*, 2 *John.* 484.) The act of 1806, (vol. 4, 616,) the principles of which are incorporated into the revised statutes of 1830, (2 *R. S.* 490, § 13; 1 *id.* 743, § 25,) was not introductory of any new rule, but was declaratory only of the former law.

The same rule prevails whether the proceedings to obtain the assignment of dower be conducted in a court of equity or a court of law, or in the court of the surrogate of the county. Chancellor Kent examined the subject on several occasions, and the result of his inquiries was, that where the land was aliened by the husband, the widow's dower was to be taken according to the value of the land at the time of alienation. If the husband mortgages the land, but continues in possession, and afterwards releases the equity of redemption to the mortgagee, the time of the release of the equity of redemption is to be deemed the period of alienation, at which the value is to be taken, and which is to be estimated, without regard to the subsequent improvements made by the purchaser. (*Hale v. James*, 6 *John. Ch.* 258. *Humphrey v. Phinney*, *supra*. *Dorchester*

v. *Coventry*, 11 *John*. 510. *Shaw v. White*, 13 *id.* 179. *Dolf v. Basset*, 15 *id.* 21. *Walker v. Schuyler*, 10 *Wend.* 480. *Coates v. Cheever*, 1 *Cowen*, 460.)

The statute is sufficiently clear to exclude the widow from the permanent improvements placed on the land by the heirs or the alienee of the husband. (1 *R. S.* 743.) But whether she is entitled to the enhanced value arising from the general advancement of the country, or from collateral circumstances, is not distinctly declared. Her claim to the benefit arising from such increased value, not occasioned by the labors or expenditures of the party, is as strong as the corresponding principle which would cast upon her the risk of a diminution of that value by any cause. But this question seems to have been settled otherwise by the courts in this state. (*Dorchester v. Coventry*, *supra*. *Shaw v. White*, *supra*.) They confine the widow strictly to the value at the time of alienation by the husband, thus giving the alienee the benefit resulting from the general increase of value of the land.

With regard to the rights of the widow on the death of her husband, the law provides that she may tarry in the chief house of her husband forty days after his death, whether her dower be sooner assigned to her or not, without being liable to any rent for the same, and in the mean time she is to have her reasonable sustenance out of the estate of her husband. (1 *R. S.* 742, § 17.) This is called the widow's quarantine, and was first given by magna charta. (*Magna Charta*, ch. 7.) It is necessarily implied that she is not liable to pay rent, but is to be supported gratuitously during that period.

Before the assignment of her dower the widow has a mere right, and she can convey no interest in the land until assignment. (*Siglar v. Van Riper*, 10 *Wend.* 414. *Green v. Putnam*, 1 *Barb.* 500.) The law casts the freehold on the heir upon the death of the ancestor, and it is his duty to make the assignment. The moment the widow is endowed her seisin relates back to the death of the husband, and is considered a continuance of his seisin, so that there never was any seisin in the heir. (*Per Walworth*, Ch. *Dunham v. Osborn*, 1 *Paige*, 636. *Safford v. Safford*, 7 *id.* 260.) Regularly, no person can assign dower who has not a *freehold estate* in the land. (1 *Cruise's Dig.* 190, *Greenl. ed.*) And the assignment by an infant is good, subject only to be corrected, if excessive, by a subsequent admeasurement. (*Id.*)

It has been doubted whether by the law prior to the revised stat-

utes of 1830, there was any limitation to the action of dower, and whether the widow might not at any time, however remote, assert her right by an action. (*Sayre v. Wisner*, 8 *Wend.* 661.) But the existing law requires that she shall demand her dower within twenty years after the death of her husband; but if at the time of such death she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge or conviction, the time during which such disability continues shall not form any part of the said term of twenty years. (1 *R. S.* 742, § 18. *Sayre v. Wisner*, *supra*. *Ward v. Kitts*, 12 *Wend.* 139.)

The mode of assigning dower when the nature of the estate will admit of it, is by metes and bounds; but when no division can be made, the widow must be endowed in a special, certain manner. Of a mill, she cannot be endowed by metes and bounds, nor in common with the heir, but she may be endowed of the third toll dish, or of the entire mill for a certain time. (1 *Cruise's Dig. Greenl. ed.* 190. *Coates v. Cheever*, 1 *Cowen*, 476, *per Savage*, *Ch. J. Co. Lit.* 32 *a.*)

The remedies which the law gives to the widow for her dower are more comprehensive and efficacious than the old form of writ of dower *unde nihil habet*. Since the code abolishing all former remedies, and substituting a civil action in lieu thereof, and conferring upon the court jurisdiction as well in equity as at law, the widow can bring her action according to the nature of the case for equitable or legal relief. It was well settled under the former practice, that though the widow's remedy for dower was *prima facie* at law, yet when the title was admitted, but impediments were thrown in the way of her proceedings, a court of equity would sustain her action for dower. (*Swaine v. Perine*, 5 *John. Ch.* 482.) There were cases, indeed, where her remedy was confined to courts of equity. Thus though she was entitled to dower in an equity of redemption, she could not maintain ejectment for it against the mortgagee or his assigns in possession, if the mortgage be forfeited, but must resort to a court of equity. (*Cooper v. Whitney*, 3 *Hill*, 95.)

So also, when the premises were in the possession of a termor whose term had not expired, an action of dower at law could not be maintained, as it could only be brought against the owner of the freehold. But the remedy in equity was undoubted. (*Badgley v. Bruce*, 4 *Paige*, 98.)

Under the existing practice, the widow, whose dower has not been assigned to her within forty days after the decease of her husband, may apply by petition for the admeasurement of her dower, to the supreme court, or to the county court of the county in which the lands subject to dower lie; or to the surrogate of the said county; specifying therein the lands in which she claims dower. A copy of the petition must be served upon the owners who claim a freehold estate in the lands in which dower is claimed, whether they be the heirs of the husband, or otherwise, or upon their guardians, if the heirs or owners be minors. The statute points out the mode of seisin, and the proceedings to be taken, and they will be found described in the books treating of the practice of the respective courts. (*See Willard's Eq. Jur.* 693 *et seq.* *Willard's Ex'rs*, 464 *et seq.* *Crary's Special Proceedings*, 1.)

In an action to recover dower in lands of which the husband died seised the widow is entitled to damages for the withholding of her dower. (1 *R. S.* 742, § 19.) The rule of damages prescribed by the statute is one third part of the annual value of the mesne profits of the lands in which her dower is secured, to be estimated in a suit against the heirs of her husband, from the time of his death; and in suits against other persons from the time of her demanding her dower of such persons; and in all cases to be estimated to the time of the recovering judgment for such damages, but not to exceed six years in the whole in any one case. (1 *R. S.* 742, § 20.)

Such damages shall not be estimated for the use of any permanent improvements made after the death of her husband, by his heirs or by any other person claiming title to such lands. (1 *R. S.* 743, § 21.)

In case the heir of the husband shall have aliened the lands, and the widow shall recover her dower therein, she is entitled to recover of such heir, her damages for withholding such dower from the time of the death of the husband to the time of the alienation by the heir, not exceeding six years in the whole. And the amount recovered from such heirs shall be deducted from the amount she would otherwise be entitled to recover from such grantee, and also any amount recovered as damages from such grantee shall be deducted from the sum she would otherwise be entitled to recover from such heir. (*Id.* § 22.)

SECTION IV.

Of the incidents of estates for life.

We shall now treat, in a separate section, of certain incidents of estates for life, the consideration of which we have, for the sake of brevity, postponed until this time. These are, for the most part, the same, whether the estate for life be conventional or created by the law.

(1.) An estate for life is subject to merge in the inheritance. Therefore, if the tenant for life surrender to him in reversion, or if the former acquires the absolute property, the life estate in either case becomes merged in the fee simple. (1 *Inst.* 338 *b.* 1 *Cruise's Dig.* 101, *Greenl. ed.*)

(2.) Tenant for life may make leases of a less estate than his own; or may assign his entire estate; nor does he forfeit his estate by leasing in fee. (*Jackson v. Mancius*, 2 *Wend.* 357. *Grout v. Townsend*, 2 *Hill*, 558.) At common law a tenant for life forfeited his estate when he conveyed a fee by feoffment with livery of seisin, or by a fine and recovery. But these conveyances are now abolished in this state, and by statute no person can convey a greater estate than he has, and a grant or conveyance of a greater estate operates only to pass all the estate which the grantor had in the lands, and which he could lawfully convey. (1 *R. S.* 739, §§ 143, 145.)

(3.) A tenant for life is entitled to *estovers*. This is the allowance for necessary wood for fuel, and for fencing and repairing buildings, where it can be done without injury to the inheritance, and where the tenant is not restrained by covenants. It is not absolutely necessary that the wood should be burned on the premises. (*Gardiner v. Dering*, 1 *Paige*, 573.) He has no right to cut down timber which serves for ornament or shelter, or which is not fit to be felled. For the purpose of fuel he is bound to take the dry, perishing or fallen wood. He must do as little injury to the inheritance as possible, consistent with his right of enjoyment. If, however, the premises demised be wild and uncultivated land, wholly covered with wood and timber, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable to waste; but he cannot cut down *all* the wood and timber so as permanently to injure the inheritance. And to what extent the wood

and timber on such land may be cut down, without waste, is, it seems, a question of fact for the jury to decide, under the direction of the court. (*Jackson v. Brownson*, 7 *John*. 227.)

It is usual and proper in conventional estates for life, to guard by proper covenants the rights of the reversioner, and to prescribe the duties of the tenant.

(4.) Tenant for life is entitled to *emblements*. By this is understood those growing crops to which the executors of tenant for life are entitled in preference to the reversioner. It extends only to such crops as yield an *annual* profit. It does not extend to grass or fruits which are the natural growth of the soil. Upon this principle the enactment is based that the widow may bequeath the crop in the ground of the land held by her in dower. (1 *R. S.* 743, § 25.) If she fails to bequeath them, they go to her executors or administrators, to be distributed with her personal estate.

The doctrine of emblements is founded on the clearest equity. (*Stewart v. Doughty*, 9 *John*. 112.) As the termination of the estate depends on the act of God, or the law, public policy requires that the inducement of the tenant to cultivate the soil should not be weakened by the fear of losing the fruits of his labor. It is not applicable where the estate is determined by the act of the tenant himself, or where the termination of the estate is fixed and made certain by the contract of the parties. In leases for years the rights of the parties are generally, and always should be, regulated by proper stipulations or covenants. In such a case the tenant knows beforehand to whom the outgoing crop belongs.

The rule with respect to emblements extends to other things besides grain or corn. It applies to roots, as when a man plants hops of old roots, for they are such things as grow by *annual* manurance and industry of the owner. (2 *Crabb's Law of Real Estate*, 52, § 1047.) But it does not apply to those things which proceed annually of themselves without the labor of man. Therefore grass and trees do not fall within the principle. [See lease, in Appendix.]

(5.) If the estate be charged with an incumbrance, tenant for life is bound to keep down the interest, and a widow being tenant for life of one third of the premises is to contribute one third of the interest. (*Swaine v. Perine*, 5 *John*. 482.) Such tenant is not bound to pay off the incumbrance, and if compelled to do so, is en-

titled to be reimbursed out of the estate chargeable with it. The rule is intended to divide the burden ratably among all the owners of the estate in proportion to their interest therein.

(6.) The tenant for life has a *prima facie* right to the custody of the title deeds of the estate, in order the more perfectly to enjoy his right to the possession of the estate. (1 *Wharton on Convey.* 45.)

(7.) A tenant for life cannot dig for gravel, lime, clay, brick, earth, stone, or the like, unless for the reparation of buildings or manuring of the land. Nor can he open a new mine; but he may dig and take the profits of mines that are open. (1 *Cruise's Dig.* 119, *Greenl. ed.* 1 *Inst.* 53 b. *Coates v. Cheever*; 1 *Cowen*, 474, *per Woodworth, J.*) In *Clavering v. Clavering*, (2 *P. Wms.* 388,) Lord Chancellor King held that tenant for life of coal mines, already worked, might open new pits or shafts to follow the same vein; and he observed that otherwise the working in the same mines would be impracticable, because the miners would be choaked for want of air, if new holes should not be continually opened to let in the air to them.

Nor can a tenant for life cut wood on the premises to burn bricks and use the soil for making them. (*Livingston v. Reynolds*, 26 *Wend.* 115. *S. C.* 2 *Hill*, 157.)

Though the doctrine of waste, as understood in England, is not applicable to a new and unsettled country; and though when the whole of a farm, when leased, is in a wild and uncultivated state, and for the use of it the lessee agrees to pay rent, still the parties will be held to have intended that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation. But this right will not authorize the lessee to destroy *all* the timber, and thereby irreparably injure the premises, or permanently diminish their value. (*Kidd v. Dennison*, 6 *Barb.* 9.)

In England the conversion of one kind of land into another, as the changing of meadow to arable, is waste; because it not only changes the course of husbandry, but also the evidence of the estate. So, also, the plowing up, burning and sowing of clover land is waste. (1 *Cruise*, *Greenl. ed.* 120.) But it is believed a different rule prevails here, and that such acts will not be treated as waste unless they are clear departures from the course of good husbandry in the par-

ticular region of country where they occur. (*Livingston v. Reynolds*, 26 *Wend.* 122, *per Bradish*, *President of the Senate.*)

Permissive waste is when the tenant suffers buildings on an estate to decay. But if a house be ruinous when it comes into the possession of the tenant for life, he is not punishable for suffering it to fall down; for in that case he is not bound by law to repair it. But as the law favors the maintenance of houses, if he cuts down timber and therewith repairs it, he can justify. (1 *Inst.* 539, 54 *b.*)

But it is not absolutely indispensable that the tenant for life should use the same timber which he cuts down on the estate for the purpose of making repairs. If he sells the timber so cut down and purchases boards with the proceeds for such repairs, it is a substantial compliance with the law, provided it be proved to be the most economical mode of making the repairs. (*Loomis v. Wilbur*, 5 *Mason*, 13.)

In Massachusetts it has been held that a tenant for life is amenable for waste committed by a trespasser. This is upon the principle that the law gives him an action of trespass, and therefore he is bound so see that trespassers do not injure the estate. (*Fay v. Brewer*, 3 *Pick.* 203, 205.)

Under this head of *permissive waste*, the tenant for life, at common law, was held answerable, if the house or other building was destroyed by fire through his carelessness or negligence. The tenant, in such case, was required to rebuild, at his own expense, and within a convenient time. (*Co. Litt.* 53 *b.*)

No person was entitled, at common law, to an action of waste against a tenant for life, but he who had the immediate estate of inheritance, expectant on the determination of the life estate. But the revised statutes have provided that a person seised of an estate in remainder or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. (1 *R. S.* 750, § 8.)

In like manner, if one joint tenant or tenant in common shall commit waste on the land held in joint tenancy or in common, he is made subject to an action of waste at the suit of his co-tenant or co-tenants. (2 *R. S.* 334, § 3.) And an heir, whether within age or of full age, may maintain an action for waste done in the time of his ancestor, as well as in his own time. (*Id.* 334, § 4.)

CHAPTER III.

OF ESTATES LESS THAN FREEHOLD.

We have hitherto treated of estates in fee simple, and of estates of freehold. We now proceed to another class, that of estates less than freehold. These are, 1. Estates for years ; 2. Estates at will ; 3. Tenancies from year to year ; 4. Estates at sufferance. All the estates less than freehold may be arranged under one or the other of these heads.

SECTION I.

Of estates for years.

The description of an estate for years, given by Littleton, 400 years ago, is applicable to that estate at the present day. "Tenant for term of years," says he in § 58, "is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and lessee. And when the lessee *entereth* by force of the lease, then is he tenant for term of years." It is not essential to the estate that its duration should be limited to one or more years. An agreement for the *possession* of lands for half a year, a quarter of a year, a month or a week or any less time, is treated as an estate for years, that being the shortest period that the law takes notice of. (*Litt.* §§ 58, 67.)

This estate is frequently called a *term* ; and the party who holds it a *termor*. The expression *term* signifies not merely the period of time during which the estate is to continue, but also the estate or interest which passes from that period. The estate must have a certain beginning and a certain end, which must be certain when the estate takes effect in interest or possession. (1 *Inst.* 45 *b.*) At common law there was a tenure between the lessor and lessee to which fealty was incident ; and there was also a privity of estate between them. (*Litt.* § 132.)

This estate is created by act of the parties and not by the act of the law. It is usually created by a written lease, though not always so. A parol lease for one year, or a less period, is valid ; if it be for a longer term than one year, it must be created by a deed or instrument in writing subscribed by the party creating it, or by his lawful

agent thereunto authorized by writing. (2 *R. S.* 134, § 6. 3 *id.* 220, 5th ed.) [See various forms of Lease, in the Appendix.]

The computation of time is regulated in this state by statute, and is according to the Gregorian or new style. (2 *R. S.* 605.) To preserve a uniformity in business transactions it is provided, that whenever the term "year" or "years" is used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; a half a year of one hundred and eighty-two days; and a quarter of a year of ninety-one days; and the added day of leap year, and the day immediately preceding, if they shall occur in any period so to be computed, are to be reckoned together as one day. Whenever the term "month" or "months" is used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar and not a lunar month, unless otherwise expressed. (2 *R. S.* 606, §§ 3, 4.)

If a lease be *from* a particular day, that day is excluded from the term. (*Wilcox v. Wood*, 9 *Wend.* 346.) The legislature has adopted the same rule of excluding the first, and including the last day, when the time within which an act is to be done is prescribed. (*Code of Procedure*, 407. *Ex parte Dean*, 2 *Cowen*, 605, and note.) The courts have adopted the same rules in regulating their practice, as in the construction of statutes and contracts; thus excluding in all cases the first day, and including the last, unless the form of expression indicates a different meaning.

The term "seisin" is not applicable to an estate for years, for the reason that livery of seisin was not required on the creating of such an estate. At common law the delivery of the lease for years did not vest an estate in the lessee, but merely gave him a right to enter on the land; and until such entry, he was not possessed of the term for years. He had merely what is called an *inter esse termini*, which he might reduce to possession at any time by an actual entry. By the operation of the statute of uses, a lease under seal expressing a consideration, creates an estate without an actual entry.

An estate for years may be created to commence at a future day; though a freehold estate could not be so created independently of the statute, which will hereafter be considered. An estate for years is denominated a *chattel real*. Having the quality of *immobility* it

savors of the realty ; and not being *indeterminate in its duration*, it ranks with chattels. The estate goes to the executors or administrators of its owner on his death, and not to his heirs at law. (2 R. S. 82, 83.) This legal succession cannot be controlled by any words of limitation in the conveyance. An estate for years limited in the lease to the *heirs*, &c. will nevertheless go to the executors or administrators.

An *estate of freehold* cannot be created out of an estate for years. If a life estate be granted out of a long term for years, it is a legal charge so long as the term lasts ; but it is repugnant to have a freehold out of a term for years. (*Butts' case*, 7 Coke, 23 a, 24 b. *Saffery v. Alderson*, 1 Adol. & Ellis, 191.)

A lease may be assigned either by the lessor or the lessee. The lessee may, before entry, while his estate is a mere *inter esse termini*, assign it over. (1 *Cruise's Dig.* 245, *Greenl. ed.*) No greater estate can be passed by the grantor than he himself possessed at the time of the grant, but every grant is conclusive against the grantor or his heirs claiming from him by descent. (1 R. S. 739, § 143.) Should the tenant assume to convey a greater estate than he had in the premises, it will not work a forfeiture of his estate, but will pass to the grantee of the estate all the title, estate, or interest, which such tenant could lawfully convey. (*Id.* § 145.)

The attornment of the tenant to a stranger is absolutely void. (1 R. S. 744, § 3.) But when the reversioner assigns, the attornment of the tenant to his assignee is unnecessary. (1 *id.* 739, § 146.) The landlord may sever the rent from the reversion and assign that alone, or reserving to himself the rent, he may assign the reversion. (*Demarest v. Willard*, 8 Cowen, 206. *Willard v. Tillman*, 2 Hill, 274.) In general, it is well settled that the assignment of the reversion, without restriction or exception, will carry to the assignee the rent and all the covenants running with the land, the rent being an incident of the reversion. (*Willard v. Tillman, supra.*)

The incidents of an estate for years, where the tenant is unrestrained by special covenants, are analogous to those of tenants for life, which have already been considered. He is entitled to *estovers*, like tenants for life. (*See ante*, p. 76.) He is punishable for waste. He cannot, therefore, lawfully cut down *timber trees*, and is bound to keep the houses and other buildings or fences in tenantable repair. If the lease be of a farm for agricultural purposes, he is bound to

cultivate the farm in a good husbandlike manner. (*Middlebrook v. Corwin*, 15 *Wend.* 170, 171.) But the lease almost invariably contains covenants and stipulations which regulate the conduct of both the parties, and specify the rights which the tenant shall enjoy, as well as the obligations which he shall assume.

If the lease contain no provisions to the contrary, and there be a covenant to pay rent, the tenant must still pay rent though the premises be destroyed by fire. (*Fowler v. Botts*, 6 *Mass. R.* 63. *Bel-four v. Weston*, 1 *D. & E.* 311.) *Hallett v. Wylie*, 3 *John.* 44.) Every prudent conveyancer should insert in the lease a suitable provision against this contingency. [See Appendix.]

The right to *emblements*, we have seen, depends on the uncertain termination of the estate. If the lease be for a certain number of years, and it contains no covenants or stipulations on the subject, the tenant is not entitled to emblements. The court, in *Whitmarsh v. Cutting*, 10 *John.* 360, say that it was the folly of the tenant to sow where he knew he could not reap. But where the determination of the estate depends on an uncertain event; as where a tenant for life lets the estate for a term of years, or where a term for years is made determinable on the life of a particular person, the tenant for years is entitled to emblements, in the same manner as a tenant for life. A lease for years frequently contains a provision as to the outgoing crop; and should always do so, to avoid disputes and to insure the continued cultivation of the soil. [See Appendix.]

The right to fixtures placed on the land by the tenant often becomes a subject of controversy at the close of the term. As between landlord and tenant, the rule for considering the annexations of the tenant as part of his personalty is more liberal than between grantor and grantee. The subject was elaborately examined by Lord Ellenborough in *Elwes v. Maw*, (3 *East*, 38.) The principle has been adopted in this state and applied in numerous cases. Thus, it has been held that the tenant may at any time remove from the premises things affixed by him to the building, for the convenience of his trade, as coppers &c. for distilling. (*Reynolds v. Streeter*, 5 *Cowen*, 323.) So also, a cider mill and press, erected at his own expense, and for his own use, by tenant from year to year, though fixed to the soil, were held to be his personal property, and to be removable by him at the end of his term; and even though not taken till after the

term, and though he was a trespasser for the entry, they were his. (*Holmes v. Tremper*, 20 John. 29. *Mott v. Palmer*, 1 Comst. 570.) So property, affixed to the freehold by the tenant for manufacturing purposes, is held to belong to the tenant, and does not pass to the grantee of the landlord. (*Raymond v. White*, 7 Cowen, 319.)

So engines and machinery, firmly affixed to a building by a tenant for years for the carrying on of a business of a personal nature, are the personal property of the tenant and removable at his will. If destroyed by a third person by negligence, the tenant and not the owner of the freehold can maintain an action for the damages. (*Cook v. The Champlain Transportation Co.* 1 Denio, 91.) And it seems that whether personal property is so annexed to the freehold, for the purposes of trade or manufactures, as to become realty and go to the heir, rather than the executor, is a question of fact. (*Hovey v. Smith*, 1 Barb. 372.)

Some kinds of fixtures and annexations are treated by the law, independently of any covenant or agreement, as personal property removable by the tenant. Those alluded to in the foregoing cases are of that description. Others depend on the conventional arrangements of the parties. Thus fences and trees are, in their own nature, real estate to the same extent as houses and other structures on the land. But they may, by the agreement between the parties, be treated as the personal property of the tenant, and not as part of the soil, the property of the reversioner. (*Mott v. Palmer*, 1 Comst. 564. *Herlakenden's case*, 4 Coke, 63 b.)

In *Penton v. Robart*, (2 East, 90,) Lord Kenyon intimated that gardeners and nurserymen may remove trees in the necessary course of their trade, and he was disposed to extend the same rule to green-houses, hot-houses &c. erected on the demised premises. But Lord Ellenborough, in *Elwes v. Maw*, (3 East, 56,) while admitting the rule as to gardeners and nurserymen, questioned it as to the owners of green-houses and hot-houses. It is doubtless competent, by agreement between the parties, to sever such erections from the freehold, and thus allow the tenant to remove them like other fixtures for the purposes of trade. Though it is believed that the suggestion of Lord Kenyon would be generally concurred in, it is desirable to remove all doubts on the subject by a provision in the lease.

When a farm is let for agricultural purposes, and the lease contains no stipulation on the subject, and there is no special custom to the contrary, the manure made upon the farm does not belong to

the tenant but to the farm. The tenant has, therefore, no more right to dispose of it to others or remove it himself from the premises, than he has to dispose of or remove a fixture. (*Middlebrook v. Corwin*, 15 *Wend.* 171. *Goodrich v. Jones*, 2 *Hill*, 142.)

With regard to fencing materials on a farm which are temporarily detached, without an intent to divert them to other uses, in the absence of any agreement to the contrary, they are to be treated as a part of the realty, in the same manner as if they had been left standing. (*Goodrich v. Jones*, *supra*.) The same rule applies to hop-poles, used necessarily in cultivating hops which were taken down, for the purpose of gathering the crop, and piled in the yard, with the intention of being replaced in the season of hop raising. (*Bishop v. Bishop*, 1 *Kern.* 123.) Even as between grantor and grantee, it seems that an article to be treated as a fixture need not be constantly fastened to the realty. (*Walker v. Sherman*, 20 *Wend.* 655, *per Cowen, J.*)

The fixtures heretofore considered have been such as were erected by the tenant himself for agricultural and mechanical purposes, or for the benefit of trade. The right of the tenant to remove them depends on the fact that they were placed on the premises by himself, for his own convenience, and with no intention to make them a part of the freehold. The reasons on which the decisions are based do not authorize a tenant to remove fixtures belonging to the premises at the time he received his lease. The moment such fixtures are severed, the title to them vests in the landlord, and the tenant, by his wrongful act forfeits all future interest in them. The removal of such fixtures is as much waste as the cutting of timber by the tenant, who has no special authority for the purpose. Such timber, the moment it is cut, vests in the owner of the land, who may maintain an action to recover its value against any one in possession, though a bona fide purchaser from the occupant. (*Mooers v. Waite*, 3 *Wend.* 104.)

There is still another class of fixtures not connected with trade or for agricultural or mechanical purposes ; but which are affixed to the demised premises by the tenant for the purpose of *ornament or convenience*. The question with regard to the right of the tenant to remove these has been more favorably considered by the courts in modern times than in the time of Lord Coke. "Many things," said Lord Mansfield, in *Lawton v. Salmon*, (1 *H. Black.* 260, *in notis*),

“may now be taken away which could not be formerly, such as erections for carrying on any trade, *marble chimney-pieces* and the like, when put up by the tenant.” And Lord Ellenborough, in *Elwes v. Maw*, (3 *East*, 53,) after speaking of trade fixtures, says the indulgence in favor of the tenant for year during the term has been since carried still further; and he has been allowed to carry away any matters of ornament, as ornamental marble, chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. In *Lee v. Ridsen*, (7 *Taunt.* 188–191,) Chief Justice Gibbs mentions wainscots screwed to the wall, trees in a nursery ground, which when severed are chattels, but standing are part of the freehold, certain grates and the like, as fixtures which tenant for years may sever during his term.

It has also been held that *stoves*, *cooling-coppers*, *mash-tubs*, *water-tubs* and *blinds* were removable as between landlord and tenant. (*Colegrove v. Dias Cantos*, 1 *Barn. & Cres.* 77.) Some of these articles were not merely matters of ornament but of general utility.

It can hardly be supposed that the mode of annexation, whether with screws or otherwise, can be further material than as affording some evidence of the intention with which the tenant made the annexation at the time.

It has always been considered, from the earliest time, that the tenant should make the removal, if he makes it at all, *during the continuance of the term*. The omission to do so would afford strong evidence of his intention, to relinquish to the reversioner his claim to the annexed article. Moreover, after the expiration of the term and the relinquishing of the possession, he could not enter to make the removal, without being a trespasser. (*Poole's case*, 1 *Salk.* 368. *Ex parte Quincy*, 1 *Atk.* 477.)

This principle applies to every species of fixture, whether for trade, manufacturing purposes, or for ornament or convenience.

The revised statutes of New York attempted to define with accuracy the relative rights of the heir and executor with respect to fixtures, but they do not provide for the claims of other parties. As between the heir and the executor it is enacted that things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support, go to the latter and must be inserted in the inventory. (2 *R. S.* 82, § 6.) The mode of annexation, as whether it is done by a screw or a nail, is not made the criterion. The arti-

cles to be treated as going to the executor in preference to the heir, must be *fixed into the wall so as to be essential to its support*. It was said by the chancellor, in *House v. House*, (10 Paige, 163,) that it was the intention of the legislature, by the provision there inserted, to put the executor or administrator upon the same footing as a tenant with respect to the right to fixtures. But the chancellor thought it was impossible to define, in a short sentence of three lines, what was to be considered a part of the freehold itself, or what were mere fixtures, or things annexed to the freehold for the purpose of trade or manufactures. He thought we must still go back to the common law and the adjudged cases for the purpose of ascertaining which is a *substantial part of the freehold*, and what is a mere fixture or thing annexed to the freehold. In that case, he held that the water wheels, mill stones, running gear and bolting apparatus of a grist and flouring mill, and other fixtures of the same character, are constituent parts of the mill, and descend to the heirs at law as real property; and do not pass to the executors or administrators of the deceased owner of the mill as a part of his personal estate.

It is quite obvious that those articles, though essential to the operation of the mill *were not essential to its support*. They might all be taken out and the mill would stand, though it would cease to be of any value for the purposes of a mill.

Under the head of articles annexed by the tenant for his convenience may be included, as has already been suggested, stoves put up for use. The stove is an article of prime necessity in a northern climate, and of essential utility at all seasons in the year. It is necessary for safety that it should communicate with a chimney and be attached at least by temporary fastenings. This is an absolutely indispensable article in a house destitute of a fireplace. Still it is not a fixture which the tenant cannot remove, nor is it so treated between grantor and grantee. (*Freeland v. Southworth*, 24 Wend. 191.) Such a stove is indeed a part of the furniture of the house, which can be removed and replaced by similar articles at pleasure. It forms no substantial part of the building, and is not essential to its support.

The legislature, moreover, have evidently treated stoves put up for use, or kept in use by a family, as a part of personalty and as exempt from the claims of creditors, either by way of administration or execution. Hence they are inserted in the inventory of the personal estate, but not treated as assets for the payment of debts, but ar-

ticles of indispensable family use. (2 R. S. 83, § 9.) And hence too they are exempt from execution against the tenant. (*Id.* 367, § 22.) If such annexations were part of the freehold, these provisions would not have been made.

The question with respect to the right to remove such annexations as are usually classed with fixtures, is not confined to controversies between the landlord and his tenant; but grows out of various other relations in life. It sometimes arises between the mortgagor and mortgagee, and sometimes between the landlord and the execution creditor of the tenant. In both respects it was noticed in *Cresson v. Stout*, (17 John. 116.) In that case it was held, in substance, that, as between mortgagor and mortgagee, spinning frames and carding machines in a mill, the former fastened to the upper floor by upright pieces, and having cleats nailed to the floor round the feet, and the latter fastened to the floor by wooden pins, were personal property. The same articles were also held to be liable to an execution against the tenant by whom they were put up. The doctrine of the courts in *Cresson v. Stout*, *supra*, met the approbation of the revisers, and formed a portion of the authority for some of the enactments of the legislature. (3 R. S. 727, 2d ed. *Revisers' Notes*.)

In *Walker v. Sherman*, (20 Wend. 636,) the question arose in *partition*, in which machinery used in, but not attached to a mill, was treated as personal property. The whole doctrine with respect to fixtures was elaborately discussed by the court, and the cases in the neighboring states examined.

In other cases the question has been examined as between vendor and vendee. (*Miller v. Plumb*, 6 Cowen, 665.) In this case Woodworth, J. approves the classification made by Lord Ellenborough in *Elwes v. Maw*, (3 East, 38,) of the parties between whom the question usually arises; 1st, between heir and executor; 2d, between the executors of tenant for life and the remainderman and reversioner; and 3d, between landlord and tenant; and cited with approbation the remarks of his lordship, that in the case between the heir and the executor the rule obtained with the most rigor, in favor of the inheritance and against the right to disannex therefrom. The other two cases he considered as belonging to the same principle; thus putting the tenant for life and for years on the like footing. But he thought the case between heir and executor and vendor and vendee was widely different. The ancestor, said the learned judge, or vendor, has the absolute control, not only of the

land, but of the improvements. The heir and executor are both representatives of the ancestor ; the vendor has an election to sell or not to sell the inheritance. If he does sell, the fixtures pass. This case was decided in 1827, and before the revised statutes were enacted, and before the decision of the chancellor in *House v. House*, *supra*.

Although the legal effect of putting a building upon another's land is to make it a part of the freehold of the latter, yet the legal effect may be controlled by an express agreement. If the parties agree, in terms, that a dwelling house shall, as between them, be considered strictly a personal chattel, it takes that character. (*Smith v. Benson*, 1 *Hill*, 178, *per Cowen, J.*)

It is not absolutely necessary that there should be at all times a *physical annexation* of the article, to constitute it a part of the realty. There may be a temporary suspension of such annexation, without the depriving the article of its privilege as part of the realty. This depends on the nature of the transaction, and the intention of the parties. The cases already referred to, namely, of fencing materials and hop poles, temporarily detached from the soil, are instances in point. It has been settled, says Cowen, J. in *Walker v. Sherman*, *supra*, ever since the year books, 14 *Henry 8th*, 25, that the stones of a grist mill, though moved for the purpose of being picked, are still a part of the freehold, and will pass by a sale of the land.

So also, by the grant of land with the mill thereon, the waters, flood gates, &c. which are necessary for the use of the mill, pass as incident to the principal subject of the grant. (*Le Roy v. Platt*, 4 *Paige*, 77.) So doors, windows, locks, keys, window blinds, lightning rods, and the like, are treated as constructively annexed, though occasionally removed for repairs or otherwise. (*Walker v. Sherman*, 20 *Wend.* 646, 7.)

In like manner deer in a park, fish in a pond, doves in a dove-house, charters or deeds of an estate, and the chest containing them, though never strictly annexed to the land, pass to the vendee with the deed of the land. (*Idem.*) They are exceptions to the general rule, and are by some authors treated as *heir-looms* rather than *fixtures*. If the vendor intends to reserve them, the deed of conveyance should contain an appropriate exception.

With respect to growing crops, in addition to what has been said under the head of emblements, (*supra*,) it is proper to remark, that

growing grass, fruit and trees, are parcel of the land, and go to the heir, rather than the executor. (*Bank of Lansingburgh v. Crary*, 1 Barb. 542. *Warren v. Leland*, 2 id. 613.) On the foreclosure of a mortgage, they pass to the purchaser as against the lessee of the mortgagor, whose lease was subsequent to the mortgage. (*Lake v. King*, 8 Wend. 584.) This is upon the principle that as between mortgagor and mortgagee, the former has no right to lease the premises, and that on the foreclosure, the mortgagee or those succeeding to him is in by title paramount, thus vesting in him not only the estate mortgaged but also the emblements. (*McKercher v. Hawley*, 16 John. 292. *Jackson v. Hopkins*, 18 id. 487. *Jackson v. Dickerson*, 6 Cowen, 147. *Aldeck v. Reynolds*, 1 Barb. Ch. 613. *Shepard v. Philbrick*, 2 Den. 174. *Gillet v. Balcolm*, 6 Barb. 370.)

The question with respect to fixtures sometimes arises between the executors of tenant for life and the remainderman or reversioner. We have already anticipated all that need be said on that subject. The same principles of public policy which encourage the industry of the tenant for years, have their application to the tenant for life.

There is sometimes a question in regard to estates for years, whether the tenant have an interest in the estate or be only a servant or laborer. In *Jackson v. Brownell*, (1 John. 207,) it was held that letting land for one year, to cultivate upon shares, creates the relation of landlord and tenant, and raises the lessee from the rank of a laborer or servant to that of a tenant. But if land be let upon shares for a single crop, it does not amount to a lease, and the owner of the land alone can bring an action for injury to the crop. (*Bradish v. Schenck*, 8 John. 151.)

The letting of land on shares is not technically a lease. In such a case the parties are tenants in common of the crops. (*Caswell v. Dietrich*, 15 Wend. 379.) But where in the letting for a number of years, the tenant rendering and paying one half the crops as rent, the interest in the soil passes to the tenant. In such a case the interest in the crops until an actual division is made, is in the tenant, and the crops belong exclusively to him. (*Stewart v. Doughty*, 9 John. 108. *Caswell v. Dietrich*, *supra*.)

It is proper to add, in this connection, that the present constitution of New York provides that no lease or grant of agricultural land for a longer period than twelve years, thereafter made, in which

shall be reserved any rent or service of any kind, shall be valid. (*Constitution of 1846, art. 1, § 14.*)

There are two other incidents of estates for years, or for life, which will be briefly noticed in this place, viz. a *surrender* and a *merger*.

A surrender is defined by Coke to be a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder. (*Co. Litt. 338 a.*) It can only be to the person who has the reversion or remainder. (*Springstein v. Schermerhorn, 12 John. 357.*) Where the land is leased *in fee* there can be no technical surrender, because there is no party having the reversion or remainder who can take it. (*Id.*)

If, however, the lessee, during the term in such a case, accepts a new lease of the same premises from the lessor, the first is deemed virtually surrendered or released, because the acceptance admits the power of the lessor to lease, which power he could not legally have without a surrender or release; but this presumption, it is said, cannot be indulged against common sense. (*Id. Van Rensselaer v. Penniman, 6 Wend. 569.*) The acceptance by the tenant of a new lease of the same premises from the same lessor, has been said by the court to be a virtual surrender in law of the first lease. (*Livingston v. Potter, 16 John. 28.*)

The statute provides for the case of tenants who have under leases from a tenant surrendering to the chief landlord, for the purpose of having a renewed lease, and prevents their rights from being infringed by such surrender. It provides that the new lease to be made by the chief landlord shall be good and valid, without a surrender of the under leases derived out of the one surrendered. It provides that the chief landlord, his lessee and the holders of such under leases, shall enjoy all their rights and interests in the same manner and to the same extent as if the original lease had been continued; and it gives to the chief landlord the same remedy by entry upon the demised premises for the rents and duties secured by such new lease, so far as the same do not exceed the rents and duties reserved in the original lease so surrendered. (1 *R. S.* 744, *as modified by ch. 274 of L. of 1846.* 3 *R. S.* 34, § 2, 5th ed. *Conkey v. Hart, 4 Kernan, 22.*) The subtenants are not injured, because as to them their rights continue as if the original lease, out of which their estate is derived, had remained unaltered and in force. It is also a virtual recognition of the right of the tenant to surrender to the landlord, whatever may have been the nature of his lease.

The doctrine of merger does not, in all its bearings, belong to the present section. It is an important branch of the law of real estate, which we have treated in a separate chapter. [See part 2, chap. 4.] Its connection with the law of life estates and of estates less than freehold, renders it proper briefly to notice it in this connection.

The definition of merger is not easily framed. It is thus defined by an eminent author: Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or is said to be merged, that is, sunk or drowned in the greater. (2 *Bl. Com.* 177. *Preston on Merger*, 6.)

With regard to the merger of terms in each other, the object is to accelerate the possession, or at least the estate in which the merger takes place. (*Preston on Merger*, 6, 7.)

There is a strong analogy between *surrender* and *merger*. It is said by a learned writer on this subject, that there is not any case in which merger will take place, unless the right of making and accepting a surrender resides in the several persons between whom the transaction which causes the determination of one of these estates takes place. (*Preston on Merger*, 23.)

An example of merger of the life estate in the reversion may be thus stated: If A., tenant for life with reversion to B. in fee, surrenders his life estate to B., or if B. releases to A. in fee, the life estate of A. is in either case absorbed in the inheritance. The necessary effect of this operation is to accelerate the estate in reversion. The reversionary estate is not enlarged by this union of the life estate—it is still a fee simple—but it is brought sooner into possession and enjoyment.

The above is as simple a case as can be put. If there were an intermediate estate between the tenant for life and the reversioner in fee, the merger would not take place. Nor would there be a merger if the one estate was held in *auter droit*, and the other in the party's *own right*. (*Preston on Merger*, 50.)

A merger sometimes has a partial operation. Thus, where a lessee of land became a purchaser of an undivided moiety of the rent or reversion, the lease and rent are merged and extinguished as to that portion of the premises. (*Lansing v. Price*, 4 *Paige*, 639.)

It is an essential requisite to merger, that the estate in immediate remainder or reversion must be as large in quantity of interest as the preceding estate, or larger than that estate. If the lessee for years

afterwards takes a conveyance from the reversioner of an estate for life to take effect immediately, the estate for years is merged and extinguished, because the life estate is larger than the estate for years. But if there be a grant to A. for life, and subsequently a grant of the reversion for twenty years, in that case A. has both estates without a merger of the one in the other. The reason is that the estate in the reversion is limited to twenty years, which is less than the preceding estate which was for life. If, therefore, A. should die within the twenty years, though his life estate would thus be determined, the residue of the term for years would vest in his executors or administrators, and be assets in their hands.

The rule may be further illustrated by other cases. Suppose A. is tenant for life, remainder to B. for life, and A. surrenders to B., A.'s estate merges in that of B. The reason is that B.'s estate for his own life is to him greater than A.'s estate, which to B is an estate *pur autre vie*. In this case the less estate merges in the greater. But if the case be reversed, and B. conveys his estate in reversion to A., no merger will ensue—for the reason that B.'s estate is to A. less than A.'s own estate, and therefore A.'s ownership will embrace the duration of both estates. (*Bowles' case*, 11 Rep. 73, 4th resolution.)

It has sometimes been made a question whether a term for years would merge in another term in remainder or reversion. If the tenant for one hundred years underlets a part of the demised premises to B. for ten years, it is obvious that the tenant for one hundred years is, with respect to B.'s tenancy, a reversioner, and capable of accepting a surrender. Should such surrender be made, no reason is perceived why the under lease would not be merged in the estate for one hundred years. After the surrender, the original term will be in the same state in point of duration of title, and right of enjoyment, except by reason of mesne incumbrances, as if no under lease had been created. (*Preston on Merger*, 182, 200.)

The doctrine of merger will be considered more at large in a subsequent chapter. [See post, Part II, ch. 4.]

SECTION II.

Of estates at will, and tenancy from year to year.

The connection between these two estates is so intimate that they may both be treated together in the same section.

“Tenant at will,” says Littleton, (§ 68,) “is when lands or tene-

ments are let by one man to another, to have and to hold to him at the will of the lessor, by force of which the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him." But according to Coke (1 *Inst.* 55 a) every such estate is at the will of both parties. Though the estate be stated to be at the will of the lessor, the law implies that it is at the will of the lessee also. In like manner should it be stated to be at the will of the lessee, the law would imply that it was at the will of the lessor also. A person who occupies land, when no terms are prescribed, and without a reservation or the payment of rent, is a tenant at will. (*Jackson v. Bradt*, 2 *Caines*, 169.)

Estates at will are not usually created by lease in express words. They have been found to be inconvenient, and exist only notionally. (*Timmings v. Rowlinson*, 3 *Bur.* 1609. *Co. Litt.* 55 a, note 3 of *Mr. Hargrave*. *Jackson v. Bryan*, 1 *John.* 324, per *Thompson, J.* *Same v. Aldrich*, 13 *id.* 110.) It has been said that a parol gift of lands creates a tenancy at will. (*Jackson v. Rogers*, 1 *John. Ch.* 33. 2 *Caines*, 6, 314.) When no express term is agreed upon these estates are considered as estates from year to year, and each party is bound to give the other a reasonable notice to quit.

A tenant at will has no such estate that he can convey to a third person. If he assigns to another, the latter, on entering, becomes a trespasser, and may be so treated by the landlord.

If the estate be determined by the landlord, the tenant is entitled to the emblements. But this is otherwise when it is determined by his own act. (*Stewart v. Doughty*, 9 *John.* 108.)

The most obvious way of putting an end to a tenancy at will is by an express declaration to that effect by either party. The statute provides that the tenancy may be determined by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom. (1 *R. S.* 745, § 7.) At the expiration of the month from the service of such notice, the landlord may re-enter, or proceed in the manner prescribed by law, to remove such tenant, without any further or other notice to quit. (*Id.* § 9. *Post v. Post*, 14 *Barb.* 253.) If the tenant shall give notice of his intention to quit, and shall not accordingly deliver up the possession thereof at the time specified in the notice, he or his executors or administrators are made liable to pay thenceforth to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, at the

same time and the same manner as the single rent. And such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid. (1 R. S. 745, § 10. *Hall v. Ballentine*, 7 John. 376.)

There are other modes of determining the tenancy. It will be determined by the landlord's selling the premises. (*Jackson v. Aldrich*, 13 John. 106.)

Any act of ownership of the landlord hostile to that of the tenant, and any act of *desertion* of the tenant, is in either case a determination of the estate. So is an act of waste by the tenant. (*Post v. Post*, 14 Barb. 254. *Phillips v. Covert*, 7 John. 4.)

The leaning of the courts in modern times has been against considering demises when no limitation for the termination of the estate is fixed into estates at will, but they have held them to be estates from year to year. This latter species of estate has nearly superseded estates at will. When there was a lease at a certain annual rent, and the tenant holds over, after the expiration of the lease, without any new agreement as to the rent, the law implies that he holds from year to year at the original rent. (*Abel v. Radcliff*, 15 John. 505. *Evertsen v. Sawyer*, 2 Wend. 507. *Pugsley v. Aikin*, 1 Kern. 496.)

It was said by the court, in *Post v. Post*, (*supra*), that the reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year. (*Jackson v. Bradt*, 2 Caines, 174.) The difference between a tenancy at will, and from year to year, with respect to the termination thereof by notice from the landlord, is that in the former case a month's notice to quit from the landlord requiring the tenant to remove from the premises, without reference to the time of the commencement of the tenancy is only required; (1 R. S. 745, § 7;) whereas, in the other case, the notice must be to determine the tenancy at the *end of the year*. (*Post v. Post*, 14 Barb. 257.)

The estate of a tenant from year to year is less frail than that of a tenancy at will. In the latter case, any entry by the landlord, or act done inconsistent with the continuance of the tenancy, puts an end to it at common law; but in the case of an estate from year to year, the landlord cannot enter until the year closes. It was held by the court of appeals, in *Livingston v. Tanner*, (4 Kern. 67,) that the purpose and design of the various provisions of the revised statutes, (1 R. S. 745, §§ 7 to 9,) were to regulate and protect the rights

of tenants at will and at sufferance, however created, by a definite and uniform rule, applying alike to each class of tenants specified; and to prescribe the conditions upon which the landlord should exercise his right of re-entry, and the prerequisites to his bringing an action of ejectment, or instituting proceedings to recover possession of the lands thus held. The statute applies to all cases where the tenancy at will or sufferance exists in law, however created. The court thought that although the language of the statute was *permissive*, it was obviously intended by the legislature to impose a positive and absolute duty upon the landlord of giving notice, before the tenancy should be determined.

The learned judge who delivered the judgment in that case, thought that since the statute, the landlord could in no case, when a tenancy at will or at sufferance exists, either re-enter or bring ejectment until the expiration of one month from the service of the notice. (*Id.* 67.) This is giving to the tenant an advantage not enjoyed by him at common law. Originally neither a tenant at will or a tenant at sufferance was entitled to notice to quit. (*Jackson v. McLeod*, 12 John. 182. *Jackson v. Bradt*, 2 Caines, 169.)

The statute above referred to, does not name tenants from year to year. The estate of the latter is different from that of an estate at will. Though in ejectment under the former practice such tenant was entitled to six months' notice, yet in the summary proceedings to remove the tenant under the act of April 23, 1820, (43 Sess. ch. 194, p. 176; 1 R. S. 745; 3 *id.* 35, 5th ed.,) a notice to the tenant was only required in the case of a tenancy at will or sufferance, originally of three months, but reduced to one month by the revised statutes, and no notice was required in the case of a tenancy from year to year. (*Nichols v. Williams*, 8 Cowen, 13. *Rowan v. Lyttle*, 11 Wend. 616. *Post v. Post*, 14 Barb. 253. *Livingston v. Tanner*, 12 *id.* 481; *S. C. on appeal*, 4 Kern. 64. *Contra*, *Prouty v. Prouty*, 5 How. 81.)

Except for the purpose of a notice to quit, to enable the party to bring an action, the estate at will retains its true character. It is sometimes held an estate from year to year for the purpose of a notice to quit. (*Bradly v. Covill*, 4 Cowen, 350. *Nichols v. Williams*, 8 *id.* 15.) The notice required preparatory to an ejectment was a notice of six months, which must terminate at the end of the year. A party who comes in under such tenant stands in the same relation to the landlord. (*Jackson v. Salmon*, 4 Wend. 324.)

In case a tenant for a year or more holds over after the end of his term, without any new agreement with his landlord, he may be treated, at the election of his landlord, as a trespasser or as a tenant from year to year, and holding in all other respects upon the terms of the original lease. Distraint for the rent, by the landlord, while that remedy existed, was held to be an unequivocal affirmation of the tenancy. The tenant has no such election; and if he holds over, though for a very short period, without any unequivocal act at the time, to give his holding the character of a trespass, he cannot deny that he is in as tenant, if the landlord elects to treat him as such; and the fact that before his term ended, he refused to keep the premises another year, even at a reduced rent, does not rebut the presumption of his holding over as tenant. (*Conway v. Starkweather*, 1 Denio, 113.)

The termination of an estate from year to year is at the period when the year expires from the first commencement of the term. In the rural districts this is of but little consequence, though it may lead to a want of uniformity in the termination of this class of estates. But it would be attended with some inconvenience in a large commercial city. It has been guarded against in the city of New York by the revised statutes. Thus, it is enacted that agreements for the occupation of lands or tenements in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city, unless otherwise expressed in the agreement. (1 R. S. 744, § 1.)

SECTION III.

Of estates at sufferance, and herein of the action for use and occupation.

The estate at sufferance is of unfrequent occurrence. It was thus described by Lord Coke. (1 Inst. 57 b.) Tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continues in possession; and wrongfully holdeth over. The primary diversity between a tenancy at will and a tenancy by sufferance is that the former is always by right, and the latter, though the entry may be by right, the holding over is by wrong. (*Id.*)

Where the tenant *pur auter vie* continues in possession after the decease of *cestui que vie*, or a tenant for years holds over after the expiration of his term: in both these cases the original entry was lawful: but the subsequent holding over unlawful, thus creating an estate at sufferance. The original entry was by the act of the party and not by the act of the law. Such tenant was originally held as a mere naked possessor, standing in no privity to the landlord, and not entitled to notice to quit. (*Jackson v. Parkhurst*, 5 John. 128. *Same v. McLeod*, 12 id. 182.) It is to estates of this description that the statute referred to in the preceding section (1 R. S. 745, § 7.) emphatically applies, as was expounded by the court of appeals in *Livingston v. Tanner*, (4 Kernan, 67.) Though general in its terms, it should be construed with reference to its subject matter, and other enactments in the same chapter. It thus gives to the tenant at sufferance who has come in by act of the parties, a right to a notice of one month to remove from the premises before instituting judicial proceedings for his removal. This abridges the common law right of the landlord in such cases, who could formerly enter upon his tenant without being treated as a trespasser, for such entry.

But there is another class of cases where the tenant comes into possession by the act of the law, and holds over, in which cases no notice is required to be given; and the tenant is treated as a trespasser and liable in that character to all the damages the rightful owner has sustained. Thus, where a person as guardian or trustee of an infant, or a husband seised in right of his wife only, and every other person having an estate determinable upon any life or lives, who after the determination of such particular estate, without the express consent of the party immediately entitled after such determination, holds over and continues in possession of any lands, tenements or hereditaments is required to be adjudged a trespasser. And the party entitled to such lands, tenements or hereditaments, upon the determination of such particular estate, or his executors or administrators, is allowed to recover in damages against every such person so holding over, and against his, her or their executors or administrators, the full value of the profits received during such wrongful possession. (1 R. S. 749. § 7. *Livingston v. Tanner*, 4 Kern. 64. *Tousey v. Tousey*, Id. 430.) A person holding in such a case, is not entitled to notice to quit, and is not within the provision of the revised statutes, requiring one month's notice

in writing to the tenant. (1 R. S. 745, § 7.) He is treated as a trespasser. (*Livingston v. Tonner, supra.*)

Where the person upon whose life any estate in lands or tenements shall depend, remains beyond sea, or absents himself in this state or elsewhere, for seven years together, the statute provides that such person shall be accounted as naturally dead, in any action concerning such lands or tenements in which his death shall come in question, unless sufficient proof be made in such case of the life of such person. (1 R. S. 749, § 6.) This is a salutary and necessary provision in a country whose population is so ambulatory as ours.

At common law no action of assumpsit for rent would lie, except upon an express promise made at the time of the demise. (*Smith v. Stewart*, 6 John. 48.) This led to the statute of 11 George 2, ch. 19, § 14, which was adopted in this state at an early day. (*See act of 1788*, 1 K. & R. 146, § 31, and which is incorporated into the revised statutes, 1 R. S. 748, § 26; and as modified by other legislation, 3 R. S. 37, § 20, 5th ed.) The statute applies only to cases where the relation of landlord and tenant had subsisted by some agreement not under seal. If therefore a person enters on land under a contract to purchase, that relation does not exist, and on his refusing to perform the contract he becomes a trespasser, and is liable only in that character. (*Smith v. Stewart, supra.*) But an action for use and occupation lies, when the holding is upon an implied, as well as when it is upon an express permission of the landlord. (*Osgood v. Dewey*, 13 John. 240.) If, therefore, the tenant after the expiration of a parol demise, and payment of rent under it, continues in possession without any new agreement, he cannot in an action against him for the use and occupation of the premises subsequent to the expiration of the former demise, dispute the title of the landlord, and his subsequent holding will be deemed to have been with the implied permission of the original lessor. (*Osgood v. Dewey, supra.*) The same consequence follows on holding over after the expiration of a lease under seal, though the lease contains a covenant for a renewal. (*Abeel v. Radcliff*, 13 John. 297.)

But this action cannot be sustained when the relation of landlord and tenant does not exist between the parties. Nor will it lie against a third person who has come in under a purchase from the supposed tenant. (*Bancroft v. Wardwell*, 13 John. 489.) Nor will it lie against a tenant against whom summary proceedings have been

forthwith commenced by the landlord, on the expiration of the term, and the tenant has been ejected. Such proceedings are founded upon the allegation of the landlord upon oath that the holding over is *without his assent or permission*. There cannot be, therefore, in such a case, an express or implied assent to the holding over, or the relation of landlord and tenant. (*Featherstonhaugh v. Bradshaw*, 1 *Wend.* 134.)

Nor will it lie where there is an outstanding subsisting lease, unless against an occupier who went in under a new and distinct agreement with the landlord. (*Grover v. Wilson*, 2 *Barb.* 264.) Nor will it lie when there has been no occupation of the premises of any description, by or under the defendant, during any part of the term for which they were leased. (*Wood v. Wilcox*, 1 *Denio*, 37.)

As the action for use and occupation is founded on contract, express or implied, and lies only where the relation of landlord and tenant exists, it cannot be maintained when the tenant has not entered into the possession at all, under the lease or agreement, either in person or by an under tenant or agent. And it seems it can only be sustained for the time the tenant actually occupied the premises, either by himself or by his subtenant or agent. (*Croswell v. Craine*, 7 *Barb.* 191.) But if the contract remains in force, the landlord may recover thereon though the tenant has deserted the premises. (*Westlake v. De Graw*, 25 *Wend.* 669.) This principle is questioned by Beardsley, J. in *Cleves v. Willoughby*, (7 *Hill*, 88,) who seems to think that under the statute a recovery can only be had for an *actual occupancy*.

CHAPTER IV.

OF ESTATES UPON CONDITION.

A condition is some quality annexed to real estate, (of which we are treating,) by virtue of which it may be created, enlarged, or defeated, upon an uncertain event. (1 *Inst.* 201 *a.*)

It may be created by *express* words, which is called a condition in *deed*; or it may arise by implication of law, which is called a condition in *law*.

A condition in deed is most properly created by the very word *condition*, but it may be accomplished by other words. The con-

veyancer, intending to create an estate in the grantee, subject to a condition, should insert appropriate words in the grant. In *Jackson v. Allen*, (3 Cowen, 220,) an alley was granted to the defendant in fee, reserving an annual rent forever to the grantor and his heirs and assigns, excepting a right of way over the alley, and the estate was declared to be upon *this express condition*, that the grantee, his heirs, &c. shall and do at all times forever hereafter, permit and suffer the grantor, his heirs, &c. to have, use and enjoy the right of way, &c. This was held to be sufficient to make the estate granted a conditional estate, without any clause of re-entry, and to entitle the grantor to bring ejectment in case the alley was obstructed. The word "proviso" is also said to be sufficient to create a condition in deed. But the word must not depend upon another sentence, and must be the words of the grantor, and be compulsory to enforce the bargainer, &c. to do an act. (*Ld. Cromwell's case*, 2 Coke, 70, 71.) Conditions are frequently annexed to the grant of an estate in order to insure the payment of a sum of money at a future day. Estates by way of mortgage owe their origin to this principle.

An estate upon condition *implied* in law, is where the condition results from the nature and constitution of the grant, without being expressed in words. The most frequent cases of implied conditions arise in the grant by government of franchises to a corporation. It is now well settled that it is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated. (*A. & A. on Corp.* 742. *The People v. Utica Ins. Co.* 15 John. 382, *per Thompson*, Ch. J. *The New York Fireman's Ins. Co. v. Ely*, 2 Cowen, 709, *per Savage*, Ch. J. *The People v. Manhattan Co.* 9 Wend. 384, *per Sutherland*, J.)

The mere omission by a corporation to exercise its powers does not of itself, disconnected from any acts, work a forfeiture of its charter. There must be something *wrong*, arising from willful *abuse*, or improper neglect; something more than accidental negligence, *excess* of power, or *mistake* in the mode of exercising an acknowledged power. (*The People v. The Kingston &c. Turnpike Co.* 23 Wend. 103. *Same v. Hillsdale and Chatham T. R.* *Id.* 254.)

Nor does the failure of the corporation to perform the implied condition of its existence produce a dissolution, or a destruction of its corporate existence. To work out that consequence there must be the judgment of the appropriate tribunal in a regular judicial proceeding in which the people are a party. (*Id.* 257.) A forfeit-

ure cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute the proceeding. (*A. & A. on Corp.* 746, 747. *Bank of Niagara v. Johnson*, 9 *Wend.* 645. *The People v. Manhattan Co.* 9 *id.* 351. *Nicoll v. The N. Y. and Erie R. R.* 2 *Kernan*, 121.)

It was on this principle of implied conditions that the doctrine of forfeiture was extended to tenants for life and others, for acts done by them inconsistent with the nature of their estate. The doctrine itself was of feudal origin, and has been subverted in this state by the revised statutes. (1 *R. S.* 739, § 145.) The rights of all parties are sufficiently protected, when the tenant assumes to convey a larger estate than he has, by making the conveyance effectual to transfer to the grantee whatever is expressed in the grant, to the extent of the tenant's interest in the subject matter, and void for the excess.

There is a distinction between a *condition* and a *limitation*. A limitation is when the duration of the estate is prescribed in the grant; as where land is granted to a man so long as he remains in a particular place, or while he remains unmarried, and the like. In such cases the estate determines when the contingency happens. (*Mary Partington's case*, 10 *Co.* 41 a.) Coke, in the case last cited, (at pages 41 and 42,) gives the words usually employed in creating a limitation, viz. *quamdiu, dum modo, dum, quosque, durante*; and for creating a condition, viz. *sub conditione, ita quod, si contingat, proviso, &c.*

There is also a material difference between a *condition* and a *covenant*, notwithstanding they are both frequently created by the same form of words. The distinction between them is illustrated by the case put by Coke, (1 *Inst.* 203 b.) When the proviso comes alone it is a condition; but he says if a man by indenture lets lands for years, "provided always and it is covenanted and agreed between the said parties, that the lessee should not alien;" this is a condition by force of the proviso, and a covenant by force of the other words. In case the condition is broken, the grantor may elect to which he will resort, for he cannot have both, as they are incompatible remedies. In *Nicoll v. The New York and Erie Rail Road*

Co. (supra,) Gardiner, speaking of the distinction between a limitation and a condition, says, the first determines the estate when the period of limitation arrives, without entry or claim; the last does not defeat the estate until entry by the grantor or his heirs, and upon entry the grantor is in as of his former estate.

Conditions can only be reserved to the grantor or lessor, or their heirs, but not to a stranger. (1 *Inst.* 214.) They must be created and annexed to the estate at the time of the making of the deed. (*Jackson v. Topping*, 1 *Wend.* 388. 2 *Cruise's Dig. tit. Condition*, § 15. *Spalding v. Hallenbeck*, 30 *Barb.* 292.)

Conditions are sometimes void in their creation. This is the case when they are—1, *impossible*; or 2, require the performance of what is contrary to the divine or municipal law; or 3, repugnant to the nature of the estate.

In the case of impossible conditions, if they be precedent conditions and an estate be granted to take effect on their performance, it is quite clear that no estate can arise. A feoffment to A. upon condition that he goes to Rome on a day, is absolute, for the condition is repugnant to the feoffment. (*Bac. Abr. tit. Condition.*)

Conditions which require the performance of what is contrary to the divine or municipal law, whether the thing be *malum in se* or *malum prohibitum*, or which require the party to omit something that is a duty, or to encourage such crimes or omissions, will always be defeated by the law. Questions of this kind more frequently arise upon bonds than upon deeds or leases; but the principle is the same in all cases.

Conditions repugnant to the estate to which they are annexed, are void in their creation. Thus a condition upon a feoffment in fee that the feoffee should not alien, is void because it is repugnant to the estate granted. In like manner, on a grant of a fee that the wife of the grantee should not be endowed, or the husband be tenant by the curtesy, is void for the like reason. (6 *Co.* 41 *a.*) Restraints upon alienation can, at common law, only be imposed by persons having at least a reversion, or a *possibility of reversion* therein. As a consequence of this doctrine, the court of appeals of New York held that where lands were leased in fee, the grantor could not annex a condition in restraint of the right of alienation by the lessee. (*De Peyster v. Michael*, 2 *Selden*, 467.) This was one of the cases in which the reservation of quarter sales and the condition and right of re-entry, upon default of their payment, were held to be void,

and the ground of their invalidity was stated to be their repugnance to the estate granted—viz. an estate in fee simple. It was conceded that in estates for life or years, conditions in restraint of alienation were lawful.*

The courts lean against forfeitures. In *Jackson v. Harrison*, (17 John. 66,) the lease contained the condition that if the lessee, his executors, &c. should assign over, or otherwise part with, the lease or the premises demised, or any part thereof, without the consent in writing of the lessor, &c. it should be lawful for the lessor, &c. to re-enter, and it contained a further clause of forfeiture at the election of the lessor, on the lessee's violating that and other covenants. The lease was for the term of seven years. The lessee underlet a part of the premises for a portion of the time the lease had to run, and this was claimed by the landlord to be a cause of forfeiture of the whole lease. But the court held that no forfeiture was incurred by such underletting, as no assignment or parting with any portion of the premises for a less period than the *whole term* would work a forfeiture of the estate.

So in the case of a lease for lives, with a condition that the lessees should not sell or dispose of, or assign their estate in the demised premises, without the permission in writing of the lessor or his heirs, and if they did the estate should be void, it was held that a lease by the lessees of a part of the premises for twenty years was no breach of the condition. (*Jackson v. Silvernail*, 15 John. 278. *Same v. Brownson*, 7 id. 227.)

The alienation of the tenant to work a forfeiture must in general be the *voluntary* act of the tenant. Where in a lease of twenty-one years the landlord reserved a right of pre-emption and the quarter sales, which were protected by a condition and forfeiture of the estate in case the tenant failed to perform the covenants on his part, it was held that a sale of the premises under a judgment confessed by the tenant was no forfeiture of the lease, unless the judgment was fraudulently confessed, with a view to defeat the lessor's reservation. (*Jackson v. Corless*, 7 John. 531. *Doe v. Carter*, 8 Term Rep. 57,

* The word *lease*, in the English books, is always for a less time than the lessor hath in the premises. (2 Bl. Com. 317.) In this state grants in fee reserving rent have long been and are recognized by our statutes. They are usually denominated *durable leases*. We have in this, as in some other instances, given an enlarged meaning to a term well known to the common law. I have generally spoken of these conveyances as leases.

300. *Jackson v. Kipp*, 3 *Wend.* 230. *Same v. Silvernail*, 15 *John.* 278.)

But while the case of a landlord seeking to enforce a forfeiture against his tenant is *stricti juris*, the tenant cannot avoid the effect of his own contract by fraud. If, therefore, he colludes with a stranger, desirous of obtaining possession of the lease, and confesses a judgment for the express purpose of enabling him to sell the premises through the medium of an execution, the purchaser with notice cannot retain the property against the landlord. (*Doe v. Carter*, 8 *T. R.* 300.)

Conditions are also *precedent* or *subsequent*. A condition precedent must be performed before the estate can vest. A condition subsequent does not prevent the vesting of an estate, but may enlarge or defeat it after it has been created. (*Litt.* § 325.)

No precise technical words are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or a covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction, and the intention of the parties. (*Per Paige, J. in Parmelee v. The Oswego and Syracuse R. R. Co.*, 2 *Seld.* 80.) The precedence of the conditions must depend on the order of time in which the intent of the transaction requires their performance. The rules for finding the intent of the parties are the same as those in regard to covenants. (*Id. Nicoll v. N. Y. and Erie R. R. Co.* 2 *Kernan*, 121.)

There is, at common law, a difference in the effect between the breach of a condition annexed to an estate of freehold, and the like breach of a condition in an estate for years. As a freehold estate could not be created without *livery*, so it could not be defeated without *entry*. But where a condition annexed to an estate for years is broken, the estate *ipso facto* ceases as soon as the condition is broken, without an entry; except where the lease provides expressly, that the landlord shall re-enter in case of a breach of the condition. In the first case the lease is absolutely void on the breach of the condition; and in the last, voidable only at the election of the landlord. (*Stuyvesant v. Davis*, 9 *Paige*, 431.)

Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates. They can only be reserved for the benefit of the grantor or his heirs, and no others

can take advantage of a breach of them. A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest as in the cases of estates for years and for life, except in cases of leases, or rather grants in fee reserving rent. (*Per Parker, J. in Nicoll v. The New York and Erie Rail Road Co.* 2 Kern. 131. 1 R. S. 748, §§ 23, 24, 25.)

These principles were applied by the court of appeals in the last cited case, where, by a conveyance to a rail road corporation, land was granted upon the condition that it should construct its road thereon within a limited time. The company having failed to perform, it was held that such failure did not divest the title; that the condition was subsequent; that the title vested in the corporation in fee on the execution of the deed, and could not be divested but by entry, or what is made equivalent to it by the statute, by the grantor or his heirs for breach of the condition to perfect the estate. This right of entry, it was said, is not a reversion, or an estate in land, and will not pass by assignment or conveyance of the premises held subject to the condition. (*Nicoll v. The N. Y. and Erie R. R. Co.* 2 Kernan, 121.)

The principle that failing to perform a condition subsequent does not *per se* divest an estate, or perfect a right, was recognized by the supreme court of the United States in the claims growing out of the acquisition of California. This was one of the questions in Fremont's case. (*Fremont v. United States*, 17 How. 542.) And the same principle was applied in various other cases. (*United States v. Reading*, 18 *id.* 1.)

With regard to the performance of conditions, and what, if any thing, will excuse from performance, there is a manifest diversity between conditions precedent and conditions subsequent. A precedent condition must be performed before the estate will vest. Even though the performance of it becomes impossible by the act of God, no estate can vest. (*Vanhorne v. Dorrance*, 2 Dall. 317. 19 John. 71, 72, *per Spencer, Ch. J.* *Taylor v. Bullen*, 6 Cowen, 627, *per Savage, Ch. J.*)

With respect to conditions subsequent a less rigorous rule prevails. If such condition be impossible at the time it was made, or becomes so afterwards, or it be defeated by the other party, the estate is absolute. (1 *Inst.* 206 a, 208 b.)

If it becomes impossible by the act of the grantor, the grant becomes single. (*The United States v. Arredondo*, 6 *Peters*, 745, per *Marshall*, Ch. J. *Whitney v. Spencer*, 4 *Cowen*, 39.)

If there be a condition in a lease against the right of the lessee or his assigns to alien during the term, without the consent in writing of the lessor, it has been held that a license by the lessor to the lessee to alien, operated not merely as a dispensation in respect to such lessee, but determined the whole condition. (*Dumpor's case*, 4 *Coke*, 119 b.) Though this case has sometimes been spoken of in terms of disfavor, it has been uniformly followed, and is still the law. (*Brummell v. Macpherson*, 14 *Ves.* 173, 175. *Dakin v. Williams*, 17 *Wend.* 457.) The reasons given for it, as abridged by the chancellor in the last cited case, are that the license gave to the lessee the power to convey an absolute interest, free from the restraint of the condition, and the assignee taking that interest, held absolute and discharged from the restraint; that the lessors could not dispense with an alienation at one time, and the estate be subject to the condition afterwards; and that as a dispensation of one alienation it operated as a dispensation to all others; and the same as to the persons; for if the lessors dispense with one, all others were at liberty, and therefore the word *assigns* being mentioned in the condition made no difference.

In order that the license or consent may entirely discharge the condition or proviso, it must be paramount to the terms of the proviso; if the consent be required to be in writing, a parol license will not be either a present or future dispensation of the condition. (*Roe v. Harrison*, 2 *T. R.* 425.)

If the condition be that the "lessee or his executors or administrators shall not set, let or assign over the whole or part of the premises," the condition applies to them as well as to the lessee, and therefore on the death of the latter, if his administrator underlets a part of the premises without a consent in writing from the lessor, he incurs a forfeiture. A parol license will not be sufficient. (*Id.* *Braddick v. Thompson*, 8 *East*, 346. *Blake's case*, 6 *Co.* 43 b. 3 *Taunton*, 73. *Jackson v. Cryslar*, 1 *John. Cas.* 125.)

And this is the same in equity as well as at law. But if a parol

license be used as a snare, and under circumstances which amount to a fraud, equity will grant relief. (*Richardson v. Evans*, 3 *Madd. R.* 218.) And no man can take advantage of a condition, who has himself prevented or dispensed with its performance. (*Williams v. The Bank of the United States*, 2 *Peters*, 102, *per Washington, J.*)

Independently of an express consent in writing, according to the terms of the condition, there are other acts of the lessor or his heirs, which operate as a waiver of the forfeiture after a breach has been incurred. This may be done by the acceptance of rent which accrued after the forfeiture, with a knowledge on the part of the landlord that the condition had been previously broken. (*Roe v. Harrison*, *supra*. *Jackson v. Allen*, 3 *Cowen*, 230. *Doe v. Bliss*, 4 *Taunton*, 735. *Doe v. Banks*, 4 *B. & A.* 401.) It proceeds upon the principle that the lessor by receiving the rent, assumes the lease to have continuance, as Lord Coke expresses it. (*Co. Litt.* 211 *b.*) So also if the landlord brings an action to recover the rent, and while distresses were lawful, if he distrained for the rent, he could not enter for the condition broken prior to the accruing of that rent. He may, however, receive the rent due before the forfeiture, and if it be received after the forfeiture it is no waiver of it. But receiving rent which accrued after the forfeiture, with a knowledge thereof, is a waiver of it. (*Jackson v. Allen*, *supra*, and the other cases there cited.)

If the forfeiture be once waived, it cannot afterwards be claimed. (*Chalker v. Chalker*, 1 *Conn.* 79.)

With regard to the *mode* of the landlord's taking advantage of a breach of a condition subsequent, the former rule required that the landlord must enter if he could; if he could not enter he was required to make claim; for a freehold, whether it lie in grant or livery, could not cease by condition, without entry or claim. (*Co. Litt.* 218.) But in this state it was held, at an early day, that an actual entry in an action of ejectment was not necessary in any case, except to avoid a fine. (*Jackson v. Cryslar*, 1 *John. Cas.* 125, *decided in* 1799.) Fines and recoveries have since been abolished, (2 *R. S.* 343, § 24;) and the civil action provided by the code of procedure has become the substitute for the action of ejectment. There does not seem to be any case in which an actual entry according to the ancient sense of that term, is now necessary. The bringing of an action, with or without previous demand, or notice, as the case may

require, is a sufficient assertion of the landlord's intention to enforce his right for the condition broken.

The consequence of a recovery for a condition broken is to reinvest the grantor or lessor with his former estate as he enjoyed it before. He thus avoids all mesne charges and incumbrances imposed upon the estate by the tenant or those claiming under him. (1 *Inst.* 202 a.)

There are some acts, it is said, which may excuse the non-performance of a condition subsequent. If it was possible at the time of making it, and it becomes impossible by the act of God afterwards, the performance is excused and the estate remains unaffected by it. (*Merrill v. Emery*, 10 *Pick.* 507.) In *The People v. Manning*, (8 *Cowen*, 297,) the principle was applied to recognizance, the performance of the condition of which had become impossible by the sickness and death of the cognizor. (*Co. Litt.* 206 a.)

In like manner, if it becomes impossible by the act of the law or of the other party, performance of it is excused. (*Same cases.*)

CHAPTER V.

OF THE LAW OF MORTGAGES.

SECTION I.

Of the nature of Mortgages.

A mortgage may be well described to be a conveyance of lands by a debtor to his creditor, as a security for the repayment of a sum of money; with a proviso that such conveyance shall be void on payment of the money secured by it, with interest, on a day therein expressed. In this state the most usual form of a mortgage is a conveyance in fee of the lands intended to be charged with the debt or obligation of the debtor, who is called the mortgagor, to the creditor, who is called the mortgagee, with a proviso or condition that the estate shall be void on the payment of the sum of money therein expressed with interest, or doing some other act according to the terms of a bond or other instrument executed by the mortgagor to the mortgagee and therein described. (*Cooper v. Whitney*, 3 *Hill*, 95. *Baker v. Thrasher*, 4 *Denio*, 495.) It usually contains a power authorizing the mortgagee, his executors, administrators or assigns, in case of any default in paying the money secured

by it, or of any part thereof, to sell the premises described, with their appurtenances, in the manner prescribed by law, and out of the money arising on such sale, to retain the principal, interest and costs, and to render the overplus to the mortgagor, his heirs or assigns.

The power of sale, when given in a mortgage, or other conveyance intended to secure the payment of money, is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid. (1 R. S. 737, § 133.)

A mortgage may be made either of an estate in fee or for years. In this state it is usually granted in fee. If, however, the mortgagor has only a less estate, as an estate for life, the mortgage will be effectual for the life of the mortgagor, though void for the excess. (*Sinclair v. Jackson*, 8 Cowen, 543. 1 R. S. 739, § 143.)

It is also enacted that no mortgage shall be construed as *implying* a covenant for the payment of the sum intended to be secured. (*Id.* 738, § 139.)

Hence it follows, that if there be no *express* covenant in the mortgage, and no bond or other instrument to secure such payment shall have been given, the remedies of the mortgagee are confined to the lands mentioned in the mortgage. (*Id.*)

Nor is it material in what *form* the agreement is expressed. Where the mortgagor *acknowledged his indebtedness to another in a certain sum*, and declared that for the purpose of *securing the payment* thereof, he transferred the property mentioned, it was held that the creditor, on default of payment, was not bound to resort, in the first instance, to the property, but might bring an action for the sum acknowledged to be due. Such language was held equivalent to an *express* covenant. (*Elder v. Rouse*, 15 Wend. 218.)

It is not essential to a mortgage that it should contain a covenant to pay money, or to do any other act, or that it should embrace in it a power of sale. A deed in fee, with a condition annexed that if the grantor should pay certain legacies charged upon the lands, sold and conveyed by the grantor to the grantee, then the deed to be void, was held to be a mortgage. (*Steward v. Hutchins*, 13 Wend. 485; *affirmed* 6 Hill, 143.)

In such a case, under the statute of New York, the mortgagee has no remedy by ejectment in a court of law, but is confined to his remedy in equity. (2 R. S. 312, § 57.) Indeed, the statute has wisely

taken away the remedy by ejectment from the mortgagor or his assigns or representatives, in all cases.

It is usual to insert the defeasance in the *same instrument*, and such is the most advisable practice. But it is not indispensable to the validity of the instrument. Where land was conveyed absolutely, and the grantee, by a separate instrument or defeasance, covenanted to reconvey to the grantor, on his paying a sum of money, the transaction was held to amount only to a mortgage. (*Peterson v. Clarke*, 15 John. 205. *Brown v. Dean*, 3 Wend. 208. *Dunham v. Day*, 2 John. Ch. 182. 15 John. 555.)

There is a distinction between a conditional sale and a mortgage. If the debt remains it is a mortgage; but if it be *extinguished* by mutual agreement, express or fairly implied, the instrument is not a mortgage. (*Eckford's Ex'r v. De Kay*, 8 Paige, 89; *affirmed* 26 Wend. 37. *Robinson v. Cropsey*, 2 Ed. V. Ch. Rep. 138.)

Though conditional sales between debtor and creditor are to be scanned with jealousy, they may still be upheld if fairly made. Such contracts are lawful in themselves, and it is only when an oppressive use is made of the advantage which a creditor has over his debtor that the courts are inclined to treat the transaction as a mortgage. In one case where a creditor, whose debt was about equal to the value of the land, received a conveyance of it from the debtor in *discharge* of the debt, and gave the grantor a stipulation that if he would find a purchaser in a year he should have all the purchase money beyond the debt and interest, the transaction was held not to be a mortgage. (*Holmes v. Grant*, 8 Paige, 243. *Cooper v. Hill*, 3 Hill, 95.)

So, also, in a later case, where the grantor conveyed lands to the grantee by an absolute deed, and the grantee on the same day executed a covenant to the grantor, reciting that the conveyance was made for the purpose of *paying* a sum of money which was specified, and covenanting that he would not convey the premises within one year without the assent of the grantor; and if the grantor, within that time, should find a purchaser, the grantee would convey to such purchaser, on receiving the amount with interest, for which the land had been conveyed to him; and that in case such sale should not be made within the year, it should then be submitted to certain persons named to determine what additional sum the grantee should pay for the land, which sum the grantee covenanted to pay; it was held by the supreme court that this transaction did not amount to a mortgage. (*Baker v. Thrasher*, 4 Denio, 493.) The relation of

debtor and creditor did not exist in this case, and the conveyance was not made to *secure* the payment of a prior indebtedness, but in *payment* of the debt. (*Id.* And see remarks of Bronson, J. disapproving of *Palmer v. Gurnsey*, 7 Wend. 248.)

The assignment of a land contract for the security of a debt due to the assignee, upon the condition, that if the debt was paid at the time stipulated, the assignee would reassign the interest, was held to be, in equity, a mortgage, and that the assignor had the right of redemption. (*Brockway v. Wells*, 1 Paige, 617.)

So also, in another case, where A. assigned the mortgage of a third person to B. as security for a less sum than the amount due thereon, with power to collect such sum, covenanting that it was due, and that such third person would pay it by a certain day, it was held to be a mortgage only. (*Slee v. Manhattan Co.* 1 Paige, 48.)

So when a sealed instrument, executed in 1809, granting land for the term of one year on rent, and conditioned to be void on payment of a certain sum, and with a covenant on the part of the grantor to pay it at the end of the year, it was held to be valid as a mortgage. (*Elliott v. Pell*, 1 Paige, 263.)

How far a deed absolute in its terms may be shown by parol evidence to have been intended as a mortgage, has led to contradictory decisions. In this state such evidence has been uniformly held admissible in courts of equity. In *Webb v. Rice*, (6 Hill, 219,) reversing the same case in 1 Hill, 606, the question arose in an action of ejectment, and it was held by the court of errors that such evidence was inadmissible in a court of law to show that a deed, absolute on its face, was intended as a mortgage. Whether such evidence was admissible in a court of equity, under any circumstances, did not become a question.

That decision, so far as it could be construed as affecting the admissibility of such evidence in a court of equity, was in conflict with the uniform course of the decisions in this state, and of some elsewhere. (*Strong v. Trustees of Mitchell*, 4 John. Ch. 167. *Marks v. Pell*, 1 id. 594. *Clark v. Henry*, 2 Cowen, 234. *Dey v. Dunham*, 2 John. Ch. 189. *Peterson v. Clark*, 15 John. 205. *Gilchrist v. Cunningham*, 8 Wend. 641. *Yarborough v. Newell*, 10 Yerger, 376. *Whitbeck v. Kane*, 1 Paige, 202. *Slee v. Manhattan Company*, 1 id. 48. *Van Buren v. Olmstead*, 5 id. 9. *Lansing v. Russell*, 3 Barb. Ch. 325. *James v. Johnson*, 6 John. Ch. 417. 3 Atk. 389. 2 id. 99. But see *Cook v. Eaton*, 16 Barb. 439, *contra.*)

The case of *Webb v. Rice* was decided in 1843. Since that time the jurisdiction in law and equity has been consolidated, and the former court of chancery abolished. But the court of appeals has steadily adhered to the well settled rule that a deed absolute upon its face may be shown by parol evidence to be a mortgage, notwithstanding the case of *Webb v. Rice*, (*supra.*) (*Hodges v. The Tennessee M. and T. Ins. Co.* 4 *Selden*, 416. *Dobson v. Pearce*, 2 *Kernan*, 156. *Crary v. Goodman*, *Id.* 266. *Despard v. Walbridge*, 1 *Smith*, 15 *N. Y. Rep.* 374. *Chester v. Bank of Kingston*, 2 *id.* 343.) All these latter cases arose since the case of *Webb v. Rice*, and since the adoption of the code of procedure. It is quite clear upon authority in this state, that the evidence is admissible, whether the action be such as was formerly called an action at law or an equitable action. There are a few other cases where the same principle prevails. Thus, a resulting trust may be proved by parol; (*Bottsford v. Burr*, 2 *John.* 409; *Boyd v. McLean*, 1 *id.* 582;) the fact that a joint maker of a bond or note was a surety; (*Chester v. Bank of Kingston*, *supra.*;) that a deed or mortgage was given as a collateral security. (*Id.*)

With regard to the assignment of mortgages, it has been repeatedly held that as such assignment is not a conveyance of land within the meaning of the statute of frauds, it is equally effectual by a mere delivery, as by a written assignment under seal. (*Runyan v. Messereau*, 11 *John.* 534.) The debt is considered the principal, and the land as a mere incident. The assignment of the debt by parol, draws the land after it as a consequence.

But the assignee of a bond and mortgage takes them subject to all the equities of the original mortgagor, but not to the latent equity of a third person. (*Murray v. Livingston*, 2 *John. Ch.* 441. *Livingston v. Dean*, 2 *id.* 479. *James v. Mowrey*, 2 *Cowen*, 246. *Pendleton v. Fay*, 2 *Paige*, 202. *Evertson v. Evertson*, 5 *id.* 644. *L'Amoreaux v. Vandemburgh*, 7 *id.* 316. *Evans v. Ellis*, 5 *Denio*, 640; *affirmed*, *Ellis v. Messerole*, 11 *Paige*, 467.)

He cannot be protected in equity as a bona fide purchaser without notice, unless he has acquired the legal as well as the equitable title; and if he purchased from a fraudulent holder, he can be protected only to the value of the property, or the amount of the money paid for it. (*Peabody v. Fenton*, 3 *Barb. Ch.* 451.) The assignee of the assignee of a mortgage takes only the title of his assignor, whatever it may be. (*Sweet v. Van Wyck*, *Id.* 647.)

The courts will protect the rights of a party who has made advances in good faith upon the credit of a security to be assigned to him. Where a mortgagor applied to a third person for an advance of money to enable him to take up his mortgage, promising to give him the same security for such money as the mortgagee then held, and upon receiving the money, paid it to the mortgagee and took an assignment of the mortgage from him to such third person, it was held that the mortgage was not discharged, and that the assignee was entitled to hold the same as a security for the money thus advanced. (*White v. Knapp*, 8 Paige, 173.)

The deposit of title deeds by way of security for money advanced gives to the party an equitable lien in the premises by way of mortgage. (*Per Sutherland, J., Jackson v. Parkhurst*, 4 Wend. 369.) Such lien cannot, however, be set up at law as a legal estate. (*Jackson v. Dunlap*, 1 John. Cas. 114. *Same v. Phipps*, 12 John. 418.)

The lien of the vendor for the purchase money is analogous to an equitable mortgage. When the vendor delivers possession of an estate to a purchaser, without receiving the purchase money, equity, whether the estate be or be not conveyed, and although there was no special agreement for that purpose, gives the vendor a lien on the land for the money. (*Sugden on Vend.* 857. *Garson v. Green*, 1 John. Ch. 308. *Clark v. Hall*, 7 Paige, 382.) The purchase money is *prima facie* a lien, and it lies on the vendee, or his heirs, to show that the vendee agreed to rest on other security. It is not devested by taking the vendee's negotiable note for the same. (*Garson v. Green*, *supra*.) Taking the note of a third person, not as security but as payment of a part of the purchase money, does not affect the lien for the residue. (*Hallock v. Smith*, 3 Barb. 267.) It exists against subsequent purchasers and incumbrancers, when they advance no new consideration, or have notice. (*Id.*) It is superior to the lien of a prior judgment against the vendee. (*Arnold v. Patrick*, 6 Paige, 310.)

The principles of equity do not require that this lien for the purchase money should be upheld further than as against the vendee and his heirs, or volunteers, or purchasers with notice of the lien. It should be defeated by an alienation to a *bona fide* purchaser without notice. (*Bagley v. Greenleaf*, 7 Wheaton, 46.)

The principle on which the doctrine rests is, that the vendee on the sale of real estate becomes the trustee of the vendor for the purchase money, or of such portion of it as remains unpaid, and the

vendor is the trustee of the purchaser for the land. (*Watson v. Le Row*, 6 Barb. 484. *Swartout v. Burr*, 1 ib. 495, 499. *Champion v. Brown*, 6 John. Ch. 402, 3.) But a subsequent purchaser from the vendor in possession, advancing a full consideration, and having no notice of the equitable lien of the first vendee, has a better equity than the latter, who by neglecting to consummate his purchase by an actual change of possession, has enabled his vendor to perpetrate a fraud.

Formerly, if a judgment debtor was in possession of land at the time of the sale thereof on an execution against him, he was estopped from denying that he had any interest in the land. The bare possession was an interest which might be sold on execution, and the purchaser acquired the same interest which the defendant in the execution had, and no more. If the latter was a mere tenant at will, or by sufferance, or even was in possession without color of right, the purchaser, as against him and those claiming under him, had a right to be substituted in his place, so far as respected the possession and any legal rights of the defendant connected therewith. (*Talbor v. Chamberlin*, 3 Paige, 220. *Jackson v. Graham*, 3 Caines, 188. *Same v. Parker*, 9 Cowen, 84. *Grosvenor v. Allen*, 9 Paige, 76. *Griffin v. Spencer*, 6 Hill, 525. *Watson v. Le Row*, 6 Barb. 484.) But the revised statutes (1 R. S. 744, § 4) have so far changed the rule in this respect, that the interest of a party holding a contract for the purchase of land cannot be barred by the docketing of a judgment or decree, nor be sold by execution upon such judgment or decree. This interest, whatever it is, can now be only reached by a bill in equity, and can thus be sold and transferred to the purchaser upon such terms as the court shall deem most conducive to the interest of the parties. (1 R. S. 744, §§ 4, 5.) Neither an estate at will or by sufferance, or the interest in a contract for the purchase of land, can be sold on execution. (1 R. S. 723; 744, §§ 4, 5. *Moyer v. Hinman*, 17 Barb. 137. *Bigelow v. Finch*, Id. 394. *Mead v. Gregg*, 12 id. 653.)

When several equities affect the same estate, it is a familiar principle in equity jurisprudence, if they be otherwise equal, they will attach upon the estate according to the periods at which they commenced; for it is a maxim of equity as well as of law, *qui prior est tempore, potior est jure*. (*Berry v. Mut. Ins. Co.* 2 John. Ch. 608. *Watson v. Le Row*, 6 Barb. 485. *Lynch v. Mut. Ins. Co.* 18 Wend. 253. *Grosvenor v. Allen*, 9 Paige, 76, 77.)

Where lands are contracted to be sold, and the purchaser contracts to sell a part of such lands, the residue is the primary fund for the payment of the original purchase money; and if the original purchaser transfers different parcels, they are chargeable in the inverse order of sale. (*Crafts v. Aspinwall*, 2 Comst. 289.)

We have hitherto spoken of mortgages in fee, which are of the most frequent occurrence in this state. But a mortgage may be given of an estate for years, and thus convey to the mortgagee only an interest in a chattel real. In the English books it is said that in the case of mortgages for terms for years, if the money is not paid on the day appointed, the estate becomes *absolutely vested at law* in the mortgagee for the residue of the term. And though a court of equity allows the mortgagor to redeem, within a reasonable time, by paying the principal, interest and costs, yet such payment only gives the mortgagor an equitable right to the term. (*Cruise's Dig.* title 15, *Mortgages*, ch. 1, § 16 to 19.) It was also supposed that mortgages for years were attended with this *advantage*, that on the death of the mortgagee, the term and the right to receive the mortgage debt vested in the same person; whereas in the case of a mortgage in fee, the estate, on the death of the mortgagee went to the heir or devisee; and the money was payable to his executor or administrator. (*Id.*) In this state, these consequences do not follow.

The statute with regard to the recording of mortgages and the power of sale and foreclosure makes no distinction between mortgages in fee and mortgages for term of years. In both cases the money received by the mortgagee goes to the executors or administrators and not to the heir. (*See as to recording, &c.* 1 R. S. 756; *as to assets*, 2 *id.* 83.) With us, too, the mortgagor is deemed seised, and is the legal owner of the land as to all persons except the mortgagee. Indeed, he may maintain trespass against the mortgagee, or a person acting under his license. (*Runyan v. Mersereau*, 11 John. 534. *Hitchcock v. Harrington*, 6 *id.* 290. *Coles v. Coles*, 15 *id.* 313.) The mortgagor is, for every substantial purpose, the real owner of the land, and the mortgagee has merely a lien upon it. (*Astor v. Miller*, 2 Paige, 68. *Astor v. Hoyt*, 5 Wend. 602.) The mortgage is a mere security for the debt; and the only right the mortgagee now has in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. (*Waring v. Smyth*, 2 Barb. Ch. 119.) An outstanding mortgage is not a breach of the

covenant of seisin. (*Sedgwick v. Hallenback*, 7 *John*. 376.) The mortgagor has no such estate in the land before foreclosure as can be sold on execution. (*Morris v. Mowatt*, 2 *Paige*, 586.)

In general, a mortgage is only given to secure the repayment of money borrowed at the time, according to the terms of the contract, or for a pre-existing debt, or as a security for some obligation incurred by the mortgagee for the mortgagor, as where the former has become bail for the latter, or the like. But this form of contract sometimes takes a far wider scope. It often becomes necessary to provide for future advances and responsibilities, and it is desirable to do so without the trouble and expense of a new mortgage on every successive advance. The parties may, by their original agreement, provide for such a case. The mortgage should be for a sum large enough to cover the contemplated advances, and should express on its face its purpose and object. The future advances will be covered by the mortgage, or by a judgment, if that security is adopted, in preference to the claim under a junior intervening incumbrance, with notice of the agreement. (*Truscott v. King*, 2 *Seld.* 157.)

The principle is that subsequent advances cannot be tacked to a prior security, to the prejudice of a *bona fide* junior incumbrancer; but a mortgage, or a judgment, is always good, to secure future loans when there is no intervening equity. (*Id.*)

The case of *Gordon v. Graham*, decided by Lord Cowper a hundred and forty years ago, and which is cited by Jewett, J. in *Truscott v. King*, (*supra*), with approbation, is an illustration of the principle on which the doctrine rests. In that case, A. mortgaged his estate to B. for a term of years, to secure a sum of money already lent to A., and also all other sums which should *thereafter* be lent, or advanced to him. A. made a second mortgage to C. for a certain sum, *with notice of the first mortgage*, and then the first mortgagee *having notice of the second mortgage*, lent a further sum. His lordship decreed that the second mortgagee should not redeem the first mortgage, without paying as well the money lent after, as that lent before, the second mortgage was made; for, he added, it was the folly of the second mortgagee *with notice* to take such security.

The supreme court, in *Livingston v. McInlay*, (16 *John*. 165,) applied this doctrine to a judgment entered up by confession, and held that where it was part of the original agreement at the time the judgment was entered, that it should be a security for future advances, beyond the amount then actually due to the plaintiff, they

saw no valid objection to it more than to a mortgage being held as security for future advances ; so far, at least, as the amount of the condition of the bond. The same doctrine has been repeatedly held in this state, and in the supreme court of the United States, and in the courts of our sister states, and no distinction has been taken in this respect between a security by judgment and a security by mortgage. (*Brinkerhoff v. Marvin*, 5 *John. Ch. R.* 320. *James v. Johnson*, 6 *id.* 417 ; *S. C. reversed in error, but not impairing it as to this question*, 2 *Cowen*, 246. *United States v. Hoe*, 3 *Cranch*, 73. *Shirras v. Craig*, 7 *id.* 34. *Conrad v. The Atlantic Ins. Co.* 1 *Peters*, 386, 447. *Leeds v. Cameron*, 3 *Sumner*, 488. *Hubbard v. Savage*, 8 *Conn. R.* 215. *Walker v. Snediker*, 1 *Hoff. Ch. R.* 145. *Commercial Bank v. Cunningham*, 24 *Pick.* 270. *Monell v. Smith*, 5 *Cowen*, 441. *Lyle v. Discomb*, 5 *Bin.* 585. *Lansing v. Woodworth*, 1 *Sandf. Ch. R.* 43. *Barry v. Merchants' Ex. Co.* *Id.* 280, 314.)

It was well remarked by Jewett, J. in *Truscott v. King*, (*supra*), that in order to secure good faith, and prevent error and imposition in dealing, it is necessary that the agreement as contained in the record of the lien, whether by mortgage or judgment, should give all the requisite information as to the *extent* and *certainty* of the contract, so that a junior creditor may, by inspection of the record and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. (*St. Andrew's Church v. Tompkins*, 7 *John. Ch.* 14. *Pettibone v. Griswold*, 4 *Conn. R.* 158. *Stoughton v. Pasco*, 5 *id.* 442. *Shepard v. Shepard*, 6 *id.* 37. *Hubbard v. Savage*, 8 *id.* 215. *Gales v. Henry*, 6 *Watts*, 57. *Walker v. Snediker*, *supra*. *Hart v. Chalker*, 14 *Conn. R.* 77.)

Where a bond and mortgage are actually given to secure a particular debt therein mentioned, the mortgagee cannot, as against subsequent purchasers or incumbrancers, hold it as a lien for an entirely distinct and different debt, upon *parol* proof that it was intended to cover that debt also. (*The Bank of Utica v. Finch*, 3 *Barb. Ch.* 302.) But he does not lose his security by extending the time of payment, although such extension is in the form of a renewal of the note which was held as collateral security for the payment of the same debt ; when it was not the intention of either party to discharge the mortgage security. (*Id.*)

A mortgage given for a present debt, and to secure future advances, should either be taken for a specific sum of money, sufficiently

large to cover the amount of the floating debt intended to be secured, or should specifically mention the sums thereafter to be advanced. It is presumed that either course would be free from objection. (*Id. Truscott v. King*, 2 *Seld.* 161.) The purpose and intent for which the security was executed may be shown by parol evidence. Such evidence does not contradict the written instrument.

But neither a mortgage or judgment can be rendered available to secure the party taking them, for future advances or responsibilities, by any *subsequent parol agreement*, in preference to the lien of a junior incumbrancer. (*Id. Ex parte Hooper*, 19 *Ves.* 477.)

SECTION II.

Of recording, and priority of mortgages and assignments.

The early statutes of this state required the registry of mortgages and of the defeasance thereof, but did not require them to be recorded in full length. (2 *Greenl.* 100.) At a later period mortgages were placed upon the same footing as other deeds with respect to the mode of their being recorded, and for nearly forty years there has been no essential difference between them. The older cases speak of mortgages being *registered* or *unregistered*; a language which is equally appropriate to the present practice.

By the existing law, every conveyance of real estate within this state, made after the passing of that act, is required to be recorded in the office of the clerk of the county where such real estate is situated; and every such conveyance not so recorded is declared to be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. (1 *R. S.* 756, § 1.)

By the 2d section of the act, the clerks of the several counties are required to provide different sets of books for the recording of deeds and mortgages; in one of which sets all conveyances, absolute in their terms, and not intended as mortgages, or as securities in the nature of mortgages, are to be recorded; and in the other set, such mortgages and securities are to be recorded.

The 3d section provides that every deed conveying real estate, which by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage and the person for whose benefit such deed shall be made,

shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect of a mortgage, or conditional deed, be also recorded therewith, and at the same time.

If a conveyance was intended only as a mortgage, there can be no good reason why the terms on which it is to be defeasible should not appear on its face. If, through inadvertence, it is taken as an absolute deed, the holder may comply with the terms of the statute, by making a written defeasance specifying the conditions on which it was intended to be given, and recording both together in the book of mortgages. If this be done before the rights of any third party have intervened, he will not be molested, and if he neglects it, he will only be in the same situation of every other mortgagee who neglects to have his security recorded. (*White v. Moon*, 1 *Paige*, 554.)

The statute concerning registry applies to mortgages of leasehold as well as of freehold estates. (*Johnson v. Stagg*, 2 *John*. 510. *Berry v. The Mut. Ins. Co.* 2 *John*. Ch. 603.) The registry under the former law, and of course the recording under the existing law, without due proof or acknowledgment, is not notice to a subsequent purchaser. (*Frost v. Beekman*, 1 *id.* 288.)

The statute does not make the registry of a mortgage indispensable. The omission only exposes the mortgagee to the hazard of losing his lien, in case of a subsequent *bona fide* purchaser, or to the postponement of it to a subsequent mortgage first recorded. As between the original parties, the acknowledgment and recording are not necessary to its validity; nor would the entire omission to record the power affect the sale as between them. (*Berry v. The Mut. Ins. Co.* 2 *John*. Ch. 603. *Jackson v. Colden*, 8 *Cowen*, 266.) Nor is priority of registry of any avail against actual previous notice of an unrecorded mortgage. (*Id.*)

The decisions in this state, referred to in the preceding section, permitting a deed absolute in terms, to be converted into a mortgage by parol evidence, are apparently adverse to the policy of the recording laws. Such security will not operate to the prejudice of subsequent *bona fide* purchasers or incumbrancers without notice. The decisions must be understood as applying only to the parties to the deed, and their representatives, and to those who become subsequent purchasers or mortgagees, with full notice that the deed absolute in terms was intended as a mortgage. Notice to the agent or attorney is, in such cases, notice to the principal. But the notice,

to supply the place of a recording of the mortgage, must be full and clear; must be more than barely sufficient to put the party on inquiry. (*Jackson v. Van Valkenburgh*, 8 Cowen, 260. *Willard's Eq. Juris.* 250, 251, 608. *Fort v. Burch*, 6 Barb. 60.) A junior mortgagee with notice of a prior unrecorded mortgage, cannot gain priority by recording his mortgage. Nor can a *bona fide* assignee of such a mortgage, without notice, unless his assignment be recorded before the prior mortgage. (*Fort v. Burch*, 5 Denio, 187.)

A second mortgagee who has neglected to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless he shows from non-delivery of possession, or other circumstances, that imposition has been or might be practiced upon him by or with the concurrence of the first mortgagee which could not be detected or guarded against by the exercise of ordinary diligence. The mere circumstance of leaving the title deeds with the mortgagor, is not of itself sufficient evidence of fraud so as to postpone the first mortgagee to a second mortgagee who has taken the title deeds without notice of the prior mortgage. There must be fraud, or gross negligence equivalent to fraud, on the part of the first mortgagee. The recording of a mortgage is with us a substitute for the deposit of the title deeds. (*Berry v. Mutual Ins. Co.* 2 John. Ch. 603.)

A *bona fide* purchaser of land, without notice of a prior unrecorded mortgage, holds the land discharged of its lien; and a subsequent recording of the mortgage cannot affect his title, nor the title of his grantees with notice of the mortgage. (*Jackson v. McChesny*, 7 Cowen, 360.) If a mortgagee receive his mortgage with notice of a former one, and with the understanding that it is to have priority, the recording of his own first cannot give it preference. (*Jackson v. Van Valkenburgh*, 8 Cowen. 260.)

As the statute protects *subsequent purchasers in good faith, and for a valuable consideration*, it becomes important to understand the meaning of those terms. Something more is required than a mere *valid consideration*, sufficient to uphold the transaction between the parties. These words have received, in the courts of this state, a definite judicial construction. They import that the purchaser, before he had notice of the prior equity of the holder of an unrecorded mortgage, must have advanced a new consideration for the estate conveyed, or have relinquished some security for a pre-existing debt due to him. The mere receiving of a conveyance in

payment of a pre-existing debt is not sufficient. (*Dickerson v. Tillinghast*, 4 *Paige*, 215.) The analogous cases of the assignee of negotiable paper for valuable consideration, without notice of a prior equity, throw light on the subject. In those cases it has uniformly been held that there must be a parting with a new consideration, by such assignee or purchaser, a giving up of some other security, or divesting himself of some right, or placing himself in a worse situation than he would been in if he had received notice of the prior equitable title or lien, previous to his purchase, in order to constitute him a bona fide purchaser for a valuable consideration, within the meaning of the rule. The leading cases on the subject in our higher courts are *Coddington v. Bay*, (20 *John*. 637;) *Stalker v. McDonald*, (6 *Hill*, 93;) *Harris v. Norton*, (16 *Barb.* 264.)

The term "*purchaser*," as used in the statute, embraces every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also every assignee of a mortgage or lease, or other conditional estate. (1 *R. S.* 762, §§ 37 and 38.) Hence a mortgagee is brought within the term, contrary to the decisions under the former law. (*Berry v. Mutual Ins. Co.* 2 *John. Ch.* 603.)

Under the former law the recording acts did not apply to the assignment of a mortgage; and no notice of the assignment, actual or constructive, was necessary to protect the assignee of the mortgage against a subsequent assignee or against other persons claiming under the assignee. The rights of the parties in this respect depended upon the rule existing before the recording acts. That rule was that the first grantee or assignee of an interest in real estate was entitled to a preference, whether the subsequent assignee or purchaser had or had not notice of the prior assignment or grant. The revised statutes, above referred to, have extended the benefit of the recording acts, by embracing under the term *purchasers* parties not formerly included in it. (*Vanderkemp v. Skelton*, 11 *Paige*, 37. *The N. Y. Life Ins. and Trust Co. v. Smith*, 2 *Barb. Ch.* 82.)

The statute requires that to entitle conveyances to be recorded they should be acknowledged by the parties executing the same, or be proved by a subscribing witness thereto. [See Appendix for act, 3 *R. S.* 46, § 4, 5th ed. et seq. for the list of persons before whom a deed or mortgage can be proved or acknowledged.] The officer taking the acknowledgment is required to know or to have satisfactory evidence that the person making such acknowledgment is the indi-

vidual described in and who executed such conveyance. (1 *R. S.* 758, § 9.) The acknowledgment of a married woman residing within this state, to a conveyance purporting to be executed by her, cannot be taken unless in addition to the requisites above, she acknowledge on a private examination apart from her husband, that she executed such conveyance freely and without any fear or compulsion of her husband; and no estate of any such married woman can pass by any conveyance not so acknowledged. (*Id.* § 10.) But when a married woman, not residing in this state, joins with her husband in any conveyance of any real estate situated within this state, the conveyance has the same effect as if she were sole; and the acknowledgment or proof of the execution of such conveyance by her may be the same as if she were sole. (*Id.* § 11.)

When the proof of the execution of a conveyance is made by a subscribing witness, such witness is required to state not only his own residence, but also that he knew the person described in and who executed the conveyance. This proof cannot be taken unless the officer by whom it is taken is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to such instrument. (*Id.* § 12. *Jackson v. Osborn*, 2 *Wend.* 555. *Same v. Gould*, 7 *id.* 364.) The object of these provisions is to prevent, as far as practicable, the fraudulent personation of one person for another. [For form of certificate of proof and acknowledgment, see Appendix.]

It would seem to follow from the foregoing that a mortgage must be either acknowledged by the mortgagor, before a proper officer, or be attested at the time of its execution, by one or more subscribing witnesses, by whom it can be proved, in order to its being recorded. But the statute concerning the alienation by deed, which will be noticed more at large elsewhere, while abolishing the mode of conveying lands by feoffment with livery of seisin, enacts that every grant in fee, or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its delivery according to the provisions of the act we have been considering, its execution and delivery shall be attested by at least one witness; or if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged. (1 *R. S.* 738, §§ 136. 137.) The purchasers here referred to, are such as are *subsequent* to the execution of the unacknowledged conveyance. It is

valid between the parties, and as to prior purchasers or incumbrancers, though it be neither acknowledged before the proper officer, or attested by a subscribing witness. (*Wood v. Chapin*, 3 Kern. 509. *Voorhes v. Presb. Ch. Amsterdam*, 17 Barb. 103.)

A mortgage not registered has a preference over a subsequent judgment docketed ; but should the land be sold by the sheriff under the judgment prior to the registry of the mortgage, a *bona fide* purchaser at the sheriff's sale would be protected against the mortgage. (*Jackson v. Dubois*, 4 John. 216.)

The *bona fide* mortgagor of a fraudulent grantee, whose mortgage is recorded before a sheriff's deed obtained by a creditor of the grantor, on a judgment rendered after the recording of the fraudulent deed, is entitled to a preference. (*Ledyard v. Butler*, 9 Paige, 132.)

There is a controlling equity in favor of the claim of the vendor of lands for the purchase money, over that of any creditor of the vendee. This equity is recognized and enforced by the statute which provides that whenever lands are sold and conveyed, and a mortgage is given by the purchaser at the same time, to secure the payment of the purchase money or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against the purchaser. (1 R. S. 749, § 5.) Literally, this applies only to a mortgage given by the purchaser to the vendor. But should a third person, by agreement between the parties, advance the money, and the mortgage be given directly to him, it comes within the equity of the statute, and such mortgagor is entitled to the same preference over a prior judgment as the vendor of the land would have had, had the mortgage been executed to him. (*Jackson v. Austin*, 15 John. 477.)

It is on this principle of an instantaneous seisin of the vendee, in cases where a mortgage is given back for the purchase money, that the widow of the vendee is not, in such cases, entitled to dower. (*Stow v. Tift*, 15 John. 458.)

On this subject it has been held as a rule of presumption, that where upon the purchase of land, a deed is executed by the vendor, and a mortgage upon the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously, and that the mortgage was intended to secure the purchase money, although given to a third person instead of the vendor, by the direction of the latter. (*Cunningham v. Knight*, 1 Barb. S. C. R. 399.)

SECTION III.

Of the rights and interest of the parties at law and in equity, and of certain incidents of the estate.

The English doctrine with respect to mortgages has been very greatly departed from in this state. In England it is laid down by Mr. Cruise that upon the execution of the conveyance by which a mortgage is created, the legal estate of freehold and inheritance, or the legal estate of the term of years created by the mortgage, becomes immediately vested in the mortgagee. A clause, it is said, is usually inserted in the mortgage deed, that until default is made in payment of the mortgage money and the interest, the mortgagor shall retain the possession and receive the rents. He thus becomes, in some respects, a tenant at will of the mortgagee; and when the proviso is that the mortgagor shall continue in possession, for the number of years given for the repayment of the mortgage money, he will be tenant for years of the mortgagee.

A different doctrine has long prevailed in this state. With us it has been well settled from an early day, that the mortgagee has a mere *chattel interest*; and that the mortgagor is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond or personal security for the debt; and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity. (*Jackson v. Bronson*, 19 *John*. 325.) This doctrine was carried out to its consequences in *Runyan v. Mersereau*, (11 *John*. 534,) where it was decided that the mortgagor or a purchaser of the equity of redemption may maintain trespass against the mortgagee, or a person acting under his license. These cases do not rest upon any stipulation in the mortgage deed reserving the possession to the mortgagor until default, as no such stipulation is usually inserted in our mortgages. The doctrine rests upon the general principle which has already been elsewhere adverted to, that a mortgage is merely a security for the debt, and that the mortgagee has no interest in the land, but only a lien upon it; the mortgagor being the legal owner. (*Hitchcock v. Harrington*, 6 *John*. 290. *Coles v. Coles*, 15, *id.* 319. *Aymar v. Bill*, 5 *John*. Ch. 570. *Morris v. Mowatt*, 2 *Paige*, 586.

Astor v. Miller, 1d. 68. *Same v. Hoyt*, 5 Wend. 602. *Waring v. Smyth*, 2 Barb. Ch. 119. *Dickinson v. Jackson*, 6 Cowen, 147.)

With us, too, it is unnecessary that the mortgage should contain a stipulation for the possession by the mortgagor of the lands mortgaged until default; and no reconveyance is required to be given by the mortgagee on receiving payment of the money due, though such payment be not made at the day. (*Waring v. Smyth*, *supra*.)

The mortgagee, or his assigns or representatives, can no longer bring ejectment for the recovery of the possession of the mortgaged premises. (2 R. S. 312, § 57.) He may indeed take possession of the land with the assent of the mortgagor, after the debt has become due and payable, and retain such possession until the debt is paid. (*Waring v. Smyth*, *supra*.)

Whether the mortgagee could maintain an action of waste against the mortgagor in possession, under any circumstances, has been litigated in our courts. In *Peterson v. Clark*, (15 John. 205,) it was held that such action could not be maintained, at least until after a forfeiture of the mortgage. They considered his interest as contingent until breach of the condition, and in case timber was cut down by the mortgagor, without special authority, the mortgagee had no such interest as to enable him to bring trover for the trees.

This case does not settle the right to the action for waste committed after the forfeiture of the mortgage. That question arose in *Southworth v. Van Pelt*, (3 Barb. S. C. R. 347,) under circumstances favorable to the plaintiff. The premises had become forfeited and a decree obtained for a foreclosure, and the mortgaged premises were a slender security for the debt. The action was upheld.

The nature of the estate of the mortgagee is such that his remedies at law for injury to the security are circumscribed. The mortgagee has neither *jus in re*, nor *ad rem*, but a mere security for his debt. The title to the land is still in the mortgagor. Nevertheless the law will, in some cases, give redress by an action, to a party whose lien by mortgage or judgment has been destroyed or impaired in value. It will do so when the injury was done *fraudulently*, but not when it results from mere negligence and want of due care and attention. (*Gardner v. Heartt*, 3 Denio, 234.)

The remedy in equity, both on the part of mortgagor and mortgagee, is in general the most appropriate and effective. When the mortgagee takes possession of the mortgaged premises before foreclos-

ure, and occupies them himself, he must account for the rents and profits, at the rate of rent which the premises by ordinary care would have produced, exclusive of taxes or repairs. (*Van Buren v. Olmstead*, 5 Paige, 9.) The questions in cases of this kind, usually arise on a bill to redeem, brought by the mortgagor or those who have succeeded to his rights, against the mortgagee or his representatives. By the payment of the debt, whether at the day or subsequently, the estate of the mortgagee is annihilated. (*Southworth v. Van Pelt*, *supra*. *Edwards v. Farmers' Fire Ins. and Loan Co.* 21 Wend. 467 ; *S. C. in error*, 26 *id.* 541.) The only difference between a payment at the day, and a payment subsequently, is that in the latter case, the party seeking to redeem may be compelled to pay costs, and in the former, not. Equity requires that the mortgagee in possession should do no act to the prejudice of the estate. He is not authorized to cut down timber and commit waste upon the premises, even though the proceeds be applied to the satisfaction of his debt. (*Youle v. Richards*, Sax. Ch. R. 534.) He is bound to keep the premises in such repair as to preserve them, and is responsible for waste. (*Bainbridge v. Owen*, 2 J. J. Marsh. R. 465. *Eden on Inj.* 204 and notes.)

It is most usual, however, that the mortgagor, or some one claiming the equity of redemption, is left in possession. Though the mortgagor is for most purposes treated as the legal owner, yet as the whole estate in the aggregate constitutes the security for the debt, equity will not permit the mortgagor to reduce it, or render it less valuable.

In one case where, by the terms of the mortgage, the mortgagor was authorized to cut the timber for the purpose of having the proceeds thereof applied to the payment of the mortgage debt, yet, because the mortgagor was proceeding to strip the mortgaged premises of the timber, which constituted the principal value of the mortgage security, he was restrained by injunction on the application of the mortgagee. (*Ensign v. Colburn*, 11 Paige, 503.)

But the mortgagor in possession may cut underwood, and cultivate the premises in a good husband-like manner, and take the ordinary fruits of the land. (*Eden on Inj.* 205.)

A mortgagee who seeks to sell the premises under the power of sale for more than is actually due, will be restrained on the application of the mortgagor, provided he offers to pay the amount equitably due. (*Vechte v. Brownell*, 8 Paige, 212.)

A mortgagee in possession will be entitled to such expenses as he is put to in keeping the estate in necessary repair, which he may add to the principal of his debt, with interest; and if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, when his title has been impeached, the mortgagee may add this to the principal of the debt, and it shall carry interest. (*Godfrey v. Watson*, 3 *Atk.* 518.) He is not to be allowed for his improvements in clearing wild land, but only for necessary reparations, and must account for the rents and profits received by him. (*Moore v. Cable*, 1 *John. Ch.* 385.) Taxes are a regular charge, and if paid by him they are to be allowed, but the expense of insurance against fire is not a charge upon mortgaged premises unless by express agreement of the mortgagor or the owner of the estate. (*Faure v. Winans, Hopkins*, 283.)

It is the general practice of courts of equity in directing an account between a mortgagor and mortgagee, that whenever the gross sum received exceeds the interest, it shall be applied to sink the principal. (*Robinson v. Cumming*, 2 *Atk.* 410.) This rule, said Lord Hardwicke, sometimes acts with hardship and has occasionally been mitigated. Where the sum is large and the mortgagee is forced to enter on the estate, he subjects himself to an account. But as he could only satisfy his debt by parcels, and was a bailiff to the mortgagor without a salary, subject to account, it was, he thought, well observed by the master, that he was not obliged, for every trifling excess of interest, to apply it to sink the principal. And his lordship further said that he did not know that the court had ever laid it down for an invariable rule, that the master must always, in taking such account, make annual rests. (*Gould v. Tancered*, 2 *Atk.* 534) But this subject will be more fully noticed in a subsequent section.

In England it has been already remarked, that in the case of a mortgage in fee, a proviso is contained in the deed that upon the payment of the money at the time specified the mortgagor shall reconvey the estate. When the mortgage is made by a *demise for years*, the proviso is that if the money be paid at the time specified, the term shall cease. When the money in such a case is not paid at the day, the term becomes absolute, and must be surrendered or assigned. Our practice in this respect we have seen is different. No reconveyance is necessary on the payment of the mortgage money, whether it be paid at the day or subsequently. (*Waring v. Smyth*,

2 Barb. Ch. 119. *Jackson v. Davis*, 18 John. 7.) This results from our considering the mortgage as a mere lien for the security of the debt, and the mortgagor substantially as the owner of the estate. The statute, instead of a reconveyance, has provided a simple and convenient mode of acknowledging satisfaction when the money is paid, and for a legal discharge of the mortgage of record. It is thus enacted, that any mortgage that has been registered or recorded, or that may be hereafter recorded, shall be discharged upon the record thereof by the officer in whose custody it shall be, whenever there shall be presented to him a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as is required to entitle conveyances to be recorded, specifying that such mortgage has been paid, or otherwise satisfied or discharged. (1 R. S. 761, § 28.) This certificate and the proof or acknowledgment of it are required to be recorded at full length ; and a reference is then made to the book and page containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof. (*Id.* § 29.) The original act of April, 1801, and which was in force until 1830, required the certificate to be attested by two or more subscribing witnesses, but did not require the registry or recording of the certificate. (1 K. & R. 481, § 4.) At the revision in 1830, the attestation of witnesses was dispensed with, and the certificate of discharge was required to be proved or acknowledged, as in the case of deeds, and to be recorded at full length, and such is the existing law of this state. A mortgage properly discharged ceases to be a lien upon the estate, and the parties are remitted to their respective rights as they existed antecedently to the giving of the mortgage.

It may sometimes be a question, when two or more mortgages are given at the same time upon the same estate, and acknowledged and recorded at the same time, as to which is to have priority. If in such a case each mortgagee was cognizant of the giving of the other mortgage, the recording acts have no application to the transaction, in respect to the question of priority. A court of equity, however, will in such a case give effect to the agreement and intention of the parties, and for this purpose will presume that the one intended to be preferred was delivered first. (*Jones v. Phelps*, 2 Barb Ch. 440.) The contemporaneous recording of two or more mortgages does not exclude the operation of any facts or circumstances which go to show

that one ought equitably to be preferred to the other. (*Stafford v. Van Rensselaer*, 9 Cowen, 316; *S. C. affirmed*, 1 Hopk. 569.)

But suppose a trustee has two sums of money belonging to different *cestui que trusts*, and loans both sums to one person at the same time, and takes separate mortgages upon the same premises, to secure the payment of the moneys loaned, and without intending to give a priority to either mortgage, in such a case there is no doubt that the two mortgages must be paid *ratably*, if the fund is not sufficient to pay both; nor would it make any difference that one of the mortgages happened to be received by the clerk and to be recorded a short time previous to the other. (*Rhodes v. Canfield*, 8 Paige, 545.) But should the mortgage first recorded be foreclosed under the statute, and the premises be sold to a *bona fide* purchaser who had no notice that the two mortgages were given simultaneously, it would raise a different question. The *bona fide* purchaser would probably gain a priority. (*Id.*)

It was at one time supposed that a tender of the money due on a mortgage, in order to discharge the land from the effect of the mortgage lien, must be at the day it becomes due by the condition. (*Merritt v. Lambert*, 7 Paige, 344.) Such seems to have been the ancient law upon this subject. (*Arnot v. Post*, 6 Hill, 68; *S. C. 2 Denio*, 344.) But the weight of authority in this state seems to be that if the mortgagor tenders the money to the mortgagee, and he refuses it, whether it be on the law day, or at any time before actual foreclosure, the land is freed forever from the condition, although the debt is not thereby extinguished. It becomes thenceforth the merely personal debt of the party. (*Edwards v. The Farmers' L. and T. Co.* 21 Wend. 467; *S. C. in error*, 26 *id.* 541.) This doctrine results from disregarding our notions as derived from the strict law of real property, and applying to the case the more reasonable principles of a court of equity in relation to this form of security.

The mortgages given to the commissioners under the act of April 5, 1837, (*Laws of 1837*, p. 121,) authorizing a loan of certain moneys belonging to the United States, deposited with the state of New York for safe keeping, vest an absolute and indefeasible estate in fee in the lands mortgaged, free from all equity of redemption, on the borrower's neglect to pay yearly and every year, on the first Tuesday

of October, or within twenty-three days thereafter, the yearly interest and the principal when it becomes due. The statute also requires that on the payment of the entire sum due, the commissioners shall, if required, give to the mortgagor a release of the mortgage, and tear from the same the seal of the mortgagor, and make an entry in the record of the time when such release was given.

Under this statute it has been held that though on default of payment the commissioners of the county where the mortgaged lands are situated, became seised of an absolute and indefeasible estate in fee, in the said lands, yet the right of redemption is not thereby barred, but exists in full force, until the premises are disposed of at a legal public sale in conformity to the statute. (*Sherwood v. Reade*, 7 Hill, 433. *Jackson v. Rhodes*, 8 Cow. 47. *Olmstead v. Elder*, 2 Sand. 325.) This results from the peculiar language of the 30th and 31st sections of the act of 1837, p. 121. Though the introductory clause of the 30th section utterly forecloses the mortgagor of all equity of redemption on his failure to pay the money as directed, the subsequent clause allows him, his heirs or assigns, after such default, to retain possession of the mortgaged premises until the first Tuesday of February thereafter, and to *redeem the same as thereafter provided*. The 31st section directs the commissioners to advertise the premises for sale at the court house in said county, on the first Tuesday of February, and on such sale directs that the purchaser thereof shall hold and enjoy such estate in the said lands as was conveyed to the said commissioners by the said mortgage, clearly and absolutely discharged of and from all benefit and equity of redemption, and all other incumbrances made or suffered after the execution of the said mortgage by the mortgagor, his or her heirs or assigns.

In the case of *Sherwood v. Reade*, (*supra*), it was said by Beardsley, J. in delivering the judgment of the court of errors, that the authority to sell as conferred by the statute is special in its nature, and must be strictly pursued, or the sale will be invalid. It is the language of all the cases in this state on the subject, that a statute authority by which a man may be deprived of his estate must be strictly pursued. Every requisite of the statute having the semblance of benefit to the owner must be strictly complied with. (*Bloom v. Burdick*, 1 Hill, 141. *Thatcher v. Powell*, 6 Wheat. 119. *Sharp v. Johnson*, 4 Hill, 99.)

A sale by one of the commissioners under the act of 1837, is void. Both must be present and participate in the sale. The sub-

sequent execution of a deed by the two cannot aid such sale. (*Powell v. Tuttle*, 3 Comst. 36, overruling *King v. Stow*, 6 John. Ch. 323.)

If the mortgagor becomes the purchaser under a regular sale of the commissioners and gives a new mortgage for the original principal, it is a mortgage for the purchase money, and upon a subsequent default, and a failure of any one to bid on the sale, the commissioners are entitled to the possession as against one who has acquired title under a judgment against the mortgagor, docketed intermediate the two mortgages. (*Com'rs v. Chase*, 6 Barb. 37.)

The various loan acts of this state of 1792, 1808 and 1837, contained the same features with respect to the absolute vesting of the estate, and foreclosure, but it is not deemed of sufficient importance to notice them more at large. (*Powell v. Tuttle*, 3 Comst. 403.) In 1850, an act was passed for the final settlement of the loans of 1792 and 1808, by a transfer to the United States' deposit fund, and to abolish the office of loan commissioner. (*Laws of 1850*, ch. 337, p. 732.)

SECTION IV.

Of the power of sale and statutory foreclosure.

It has long been usual in this state to insert in the mortgage a power of sale, to the effect that in case default should be made in the payment of the principal or interest, as provided in the mortgage, then the mortgagee, his executors, administrators and assigns are empowered to sell the mortgaged premises, with the appurtenances, or any part thereof, in the manner prescribed by law; and out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale; and rendering the overplus, if any there be, on demand, to the mortgagor, his heirs or assigns.

Previous to 1830, to entitle the party to execute a power of sale, he must have been at the time, at least twenty-five years old, and that rule applied to all powers executed since the 19th day of March, 1775. (*Laws of 1813*, p. 375, § 5.) At the revision of the laws in 1830, while the old rule was recognized for all past transactions, the age of twenty-one years was taken as the age of majority in all future cases. (2 R. S. 545.) A power of sale in a mortgage executed in 1792 by a person under the age of twenty-five years was void. (*Burnet v. Denniston*, 5 John. Ch. 35.) A power of sale in

a mortgage is of no importance except to give the party the right to the statutory foreclosure; if there be no power of sale in the mortgage, the foreclosure can only be conducted in a court of equity, according to the course and practice of such court.

The proceedings under the statute to foreclose by advertisement, are pointed out in the act. To entitle the holder of the mortgage to give the notice prescribed by law, and to make such foreclosure, it is requisite (1.) That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative. (2.) That no proceeding shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered thereon has been returned unsatisfied in whole or in part. (3.) That such power of sale has been duly registered, or the mortgage containing the same has been duly recorded. (2 *R. S.* 545, § 2.)

Notice that such mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given as follows: 1. By publishing the same for twelve weeks successively at least once in each week, in a newspaper printed in the county where the premises intended to be sold shall be situated, or if such premises shall be situated in two or more counties, in a newspaper printed in either of them. 2. By affixing a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, on the outward door of the building where the county courts are directed to be held, in the county where the premises are situated; or if there be two or more such buildings, then on the outward door of that which shall be nearest the premises; and by delivering a copy of such notice at least twelve weeks prior to the time therein specified for the sale, to the clerk of the county in which the mortgaged premises are situated, who shall immediately affix the same in a book prepared and kept by him for that purpose; and who shall also enter in said book, at the bottom of such notice, the time of receiving and affixing the same, duly subscribed by said clerk, and shall index such notice to the name of the mortgagor; for which service the clerk shall be entitled to a fee of twenty-five cents. (2 *R. S.* 545, § 3, *as amended* 1842, *ch.* 277, § 5; *and* 1857, *ch.* 308, § 1. 3 *R. S.* 859, 860, 5th ed.) 3. By serving a copy of such notice, at least fourteen days prior to the time therein specified for the sale, upon the mortgagor or his

personal representatives, and upon the subsequent grantees and mortgagees of the premises whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien by or under a judgment or decree upon the mortgaged premises, subsequent to such mortgage, personally, or by leaving the same at their dwelling house in charge of some person of suitable age, or by serving a copy of such notice upon said persons at least twenty-eight days prior to the time therein specified for the sale, by depositing the same in the post office, properly folded and directed to the said persons at their respective places of residence. (2 R. S. 546, as amended 1844, ch. 346, § 1. 3 R. S. 860, 5th ed.)

Previous to the act of 1842, a notice of twenty-four weeks was necessary. In *James v. Stull*, (9 Barb. 482,) it became a question whether the change from twenty-four weeks to twelve weeks was not unconstitutional and void, so far as operated upon mortgages in existence at the time of its passage, and it was held to be a valid exercise of the power of the legislature over the remedy, and did not affect the obligation of the contract.

With regard to the time of the publication of notice, it has been held that the first publication of a twelve weeks' notice must be at least eighty-four days, or 12 full weeks before the sale, one day being included and one excluded; and the publication must be in each intervening week until the expiration of the time required by the statute. (*Bunce v. Reed*, 16 Barb. 347.)

With regard to the notice forwarded through the post office, it has been held that the statute does not require that it should be deposited in any particular post office; the rule applicable to attorneys requiring the notice to be deposited in the post office at the residence of the attorney making the service, (*Schenck v. McKee*, 4 How. 246,) not applying to a foreclosure of mortgages under the statute. The judge however intimated that it should be mailed in this state, as it is a proceeding here. (*Bunce v. Reed*, *supra*. *Stanton v. Cline*, 1 Kernan, 196.)

A copy of the notice must be served on the mortgagor if he is living, and in case of his death, on his personal representatives. This must be complied with, or the foreclosure will be void. (*Cole v. Moffit*, 20 Barb. 18. *St. John v. Bumpstead*, 17 Barb. 100.)

The statute prescribes with great particularity what shall be contained in the notice. It must specify, 1. The names of the mort-

gagor and of the mortgagee, and the assignee of the mortgage, if any ; 2. The date of the mortgage and where recorded, or where the power of sale is registered ; 3. The amount claimed to be due thereon at the time of the first publication of such notice ; and 4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage. (2 R. S. 546, § 4 ; *Id.* 830, 5th ed.)

The statute, requiring the amount claimed to be due at the time of the first publication, is directory only, and no penalty is prescribed for an error in this respect. An erroneous claim as to the amount will not ordinarily vitiate the sale, unless it be fraudulently done, and the mistake be calculated to mislead. (*Klock v. Cronkhite*, 1 *Hill*, 108. *Bunce v. Reed*, *sup.* *Jencks v. Alexander*, 11 *Paige*, 626.)

In case the bond and mortgage are payable by installments, the mortgagee or his assignees, under the ordinary power of sale, must sell for the whole sum secured by the mortgage, whether it be actually due or not. By failure to pay the first installment the whole bond at law becomes due. The mortgagee should therefore state in his notice and claim the whole amount secured by the mortgage to be due and payable on the first default. (*Holden v. Gilbert*, 7 *Paige*, 208. *Cox v. Wheeler*, *Id.* 248.) Should the mortgagee sell the whole premises on a mortgage payable by installments, subject to the future installments, the land would become, in equity, the primary fund for the payment of such residue, and the mortgagor would be entitled to any surplus proceeds of the sale. Should the mortgagee himself become the purchaser, the whole mortgage debt would be extinguished. (*Cox v. Wheeler*, 7 *Paige*, 248. *Tice v. Anin*, 2 *John. Ch.* 125.) The mortgagee has no doubt the right to sell the premises under the power discharged from the lien of future installments, and to retain their amount out of the surplus proceeds of the sale. (*Holden v. Gilbert*, *supra.*) In effect the whole debt becomes due on the happening of the first default. Hand, J. in *Bunce v. Reed*, (*supra.*) says that it is most regular to sell for the whole amount, on a statute foreclosure, though a single installment be due ; but he intimates that a power may be so drawn as to make more than one sale.

In view of the embarrassments attending a statutory foreclosure at law, when the mortgage is payable by installments, the better remedy would seem to be a foreclosure in a court of equity in cases of that kind. (2 R. S. 191. *Leonard v. Morris*, 9 *Paige*, 90.)

It is not indispensable to a right to the statutory foreclosure, that

the mortgage should be payable in money alone. When it was given to secure the payment of a debt in specific articles, and the value of the articles was liquidated by the mortgage in case of default, it was held to be equivalent to a mortgage to secure the payment of money. (*Jacks v. Turner*, 7 *Wend.* 458.)

But when the condition of the mortgage is for the performance of covenants, and the damages are unliquidated, it is quite clear that there can be no foreclosure under the statute, and that the remedy is either by an action at law on the bond, or by bill in equity to foreclose the mortgage. (*Ferguson v. Kimball*, 3 *Barb. Ch.* 619. *Ferguson v. Ferguson*, 2 *Comst.* 364.)

The statute has wisely provided that a sale under a statute foreclosure may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed. (2 *R. S.* 546, § 5.) But the notice of such postponement as published in the paper must conform to the adjournment as previously announced. A postponement may indeed be made before the day appointed for the sale, by inserting a notice thereof in the newspaper in which the original advertisement was published, (*Miller v. Hull*, 4 *Denio*, 107,) as well as on the day at which had been originally appointed in the notice. (*Id.*)

The sale under a power is required to be at public auction, in the daytime, in the county where the mortgaged premises, or some part of them, are situated; except in sale on mortgages to the people of this state, in which cases the sale may be made at the capitol. If the premises consist of distinct farms, tracts or lots, they must be sold separately; and no more farms, tracts or lots may be sold than are necessary to satisfy the amount due on such mortgage, at the time of the first publication of notice of sale, with interest, and the costs and expenses allowed by law. (3 *R. S.* 860, § 6, 5th ed.) Under this statute it has been held that the sale to make an effectual foreclosure must be at public auction, notwithstanding the power contained in the mortgage authorizes the mortgagee on default to sell the premises at private sale to satisfy the debt. (*Lawrence v. The Farmers' Loan and Trust Co.* 3 *Kern.* 200.)

The statute requiring mortgaged premises to be sold in parcels was designed to provide for a sale of premises consisting, at the time the mortgage was given, of distinct tracts, farms or lots, and mort-

gaged and described as such; and not for the sale of premises mortgaged as one farm, tract or lot, and being in fact but one farm, tract or lot at that time, although subsequently subdivided. (*Lamerson v. Marvin*, 8 Barb. 9.)

At the common law, the power of sale contained in a mortgage of real estate could only be executed by giving a deed. (*Arnot v. McClure*, 4 Denio, 44.) It may still be executed in that way when a party other than the mortgagee or his assigns is the purchaser. In 1808 the mortgagee or his assignee or legal representatives were authorized by statute to purchase for his, her or their benefit or account, (5 *Web.* 341, § 5; 1 *R. L.* 375, § 10;) and such is the existing law. (3 *R. S.* 861, § 7, 5th ed.) As the mortgagee could not convey to himself, it was very justly concluded that the legislature intended that the foreclosure should be complete without a deed. (*Jackson v. Colden*, 4 *Cowen*, 266, 276. *Slee v. Manhattan Co.* 1 *Paige*, 48.)

The affidavits of sale and of publication are required to be recorded by the county clerk in a book kept for the record of mortgages; and the original affidavits, the record thereof, and certified copies of such record are made presumptive evidence of the facts therein contained. (2 *R. S.* 547, § 10, as amended in 1844. ch. 346, § 2, and 1857, ch. 308, § 2. 3 *R. S.* 86, 5th ed. *Bunce v. Reed*, 16 Barb. 347.)

In 1838 the act was so amended by ch. 266, § 8, that when the mortgaged premises, or any part thereof, shall have been purchased at such sale by the mortgagee, his legal representatives, or his or their assigns, or by any other person or persons whatsoever, the affidavits of the publication and affixing notice of sale, and of the circumstances of such sale, shall be evidence of the sale and of the foreclosure of the equity of redemption, without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee, upon such sale to a third person, has heretofore been. (*Bunce v. Reed*, *supra*. *Cohoes Co. v. Goss*, 13 Barb. 137. 3 *R. S.* 862, 5th ed.)

The revised statutes, as amended in 1844, ch. 346, § 4, (3 *R. S.* 861, 5th ed.) have declared the effect of the statute foreclosure, when conducted in the manner prescribed by law, and when the purchase is made in good faith. When these circumstances concur, it is declared to be equivalent to a foreclosure and sale under the decree of a court of equity, so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives,

and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, and also of any person having a lien, by any judgment or decree upon the land or any part thereof contained in such mortgage, subsequent to such mortgage, and of every person having any lien or claim by or under such subsequent judgment or decree, **who** shall have been served with notice of said sale as required by law.

The revised statutes, as originally framed, gave less effect to a statute foreclosure than the existing law. A party whose mortgage of the same premisses, or any part thereof, or whose title accrued prior to such sale, and a creditor to whom the mortgaged premises or any part thereof was bound before such sale, by any judgment at law or decree in equity, was not prejudiced by such sale, nor were his rights or interests in any way affected thereby. (2 R. S. 546, § 8.) Under the former law, the purchaser at a statute foreclosure, if there were judgments subsequent to the mortgage, remaining a lien upon the property at the time of the sale under the statute, took the whole legal and equitable interest in the property as against the mortgagor and all persons claiming under him; subject, however, to the equitable right of the judgment creditor to redeem, in the same manner as if such foreclosure had not taken place. (*Benedict v. Gilman*, 4 Paige, 61.) The effect of the statute foreclosure under that act was to transfer to the purchaser the rights of the mortgagee, so far as he had any in the mortgaged premises as a security for his debt; and also so much of the equity of redemption as was not bound by the lien of a junior mortgage or judgment. (*Vroom v. Ditmos*, 5 id. 526.) As a necessary consequence, a subsequent incumbrancer had no claim to the surplus produced by a sale on a statute foreclosure, as his lien was not affected by the proceeding. (*Waller v. Harris*, 7 id. 167.)

The amendment introduced in 1844, and already adverted to, requires a notice of the proceedings to be served on the subsequent grantees and mortgagees of the premises whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien by or under a judgment or decree upon the mortgaged premises, subsequent to such mortgage, personally, or by leaving the same at their dwelling house in charge of some person of suitable age, or by serving a notice through the post office. (*See ante*, 51, 52.)

These requirements of the statute certainly make those persons,

in a qualified sense, parties to the proceeding, and justify the legislature in giving the effect to the foreclosure mentioned in the 8th section. But the statute fails to make any suitable provision for the rights of infants or other persons laboring under disability. (*Demarest v. Wynkoop*, 3 *John. Ch.* 146.) Nor does it make any provision where the mortgagor claims that the security is invalid for usury or any other cause. If there be any just legal or equitable defense to the mortgage, it must be asserted in an appropriate action in the common law courts. It is true, indeed, that a statute foreclosure of a paid mortgage conveys no title, though the sale is to a *bona fide* purchaser. (*Cameron v. Erwin*, 5 *Hill*, 272.)

In general, a power created by a feme covert is ineffectual on the ground of the disability of coverture. It has been shown that a power of sale in a mortgage executed in 1792, by a person under twenty-five years, is void. (*Burnet v. Denniston*, 5 *John. Ch.* 35.) But as a feme covert is authorized to join with her husband in a mortgage of her own land, it is conceived that she may execute a valid power of sale. She can convey her land by joining with her husband, and acknowledging the deed before a proper officer on a private examination apart from her husband. (1 *R. S.* 758, § 10. 3 *id.* 53, 5th ed.)

A power to mortgage includes in it a power to authorize the mortgagee to sell, in default of payment. It is an incident to the power to mortgage, and is included in that power. (*Wilson v. Troup*, 7 *John. Ch.* 25, 32.)

With respect to non-resident parties, the revised statutes provide that when any married woman, not residing in this state, shall join with her husband in any conveyance of any real estate situated within this state, the conveyance shall have the same effect as if she were sole; and the acknowledgment or proof of the execution of such conveyance, made by her, may be the same as if she were sole. This provision was adopted at an early day, and the effect was to treat a non-resident *feme covert*, with respect to conveyances of her land, as if she were sole; and to dispense with a private examination apart from her husband. (1 *K. & R.* 478, § 2. 1 *R. S.* 738, § 11.) Her title to dower in the lands of her husband situated in this state, as well as her title to lands of which she was seised in her own right, was thus extinguished in the one case, and transferred in the other in a manner different from that applicable to resident *femes covert*.

But the statute only extended to *actual conveyances of real estate*

situated within this state. It did not embrace powers of attorney for the conveyance of real estate situated in this state, the necessity for which led to the act of 1835, ch. 275. By that statute it is enacted that when any married woman residing out of this state shall have joined with her husband in executing any power of attorney for the conveyance of real estate situated in this state, the conveyance executed by virtue of such power shall have the same force and effect as if executed by such married woman in her own proper person; provided that the execution of such power of attorney, by such married woman, shall first have been duly proved or acknowledged, according to the provisions of the revised statutes in relation to conveyances executed by married women residing out of this state. (3 R. S. 59, § 73, 5th ed.)

If the wife be an infant under the age of twenty-one years, the deed as to her, if the conveyance be of her property, is voidable only and not void: but if, in such case, she join with her husband in order to extinguish her dower, it is absolutely void. (*Sherman v. Garfield*, 1 Denio, 329.) The common law doctrine that a woman during coverture cannot alien her lands by deed, never prevailed in this state. A deed therefore of real estate, executed by her in conjunction with her husband, acknowledged by her in the form prescribed by law, is valid. But when she is an *infant* as well as a *feme covert*, the disability arising from infancy remains, although she execute and acknowledge a deed in the form prescribed by statute. (*Boal v. Mix*, 17 Wend. 119.)

How far the acts of 1848 and 1849, for the more effectual protection of the property of married women, (*L. of 1848*, p. 307; *L. of 1849*, p. 528,) have enabled married women to mortgage their separate estate, and thus incidentally to dispose of it through the power of sale, is not perhaps yet fully settled. The original act of 1848 does not confer power upon the *feme covert* to devise or bequeath her property by last will and testament. This defect was remedied by the act of 1849. (*Wadhams v. The Am. Home Miss. Society*, 2 Kern. 425.) And it would seem that by the act of 1849, in respect to estates acquired and held under the protection of the statute, the disabilities of coverture are in fact removed. (*Yale v. Dederer*, 4 Smith, [18 N. Y. Rep.] 271.) It would seem, therefore, to follow, that a married woman may create an express charge on her separate estate, in the same manner as if she were a *feme sole*. (*Id.*) The act of 1860, ch. 90, while in some respects it enlarges the power

of married women, interposes checks to their alienation of their real property.

SECTION V.

Of foreclosure in equity; and herein of the liens on real estate.

The jurisdiction of the supreme court, under the constitution of 1846, is ample over the subject of foreclosure, whether the mortgage contain a power of sale or not, or whether the deed be absolute in terms, and the defeasance as a mortgage be only made out by oral evidence. If the mortgage be to secure unliquidated damages, or if there be no power of sale in the mortgage, it can only be foreclosed in a court of equity. (*Ferguson v. Kimball*, 3 Barb. Ch. R. 616. *Same v. Ferguson*, 2 Comst. 360.)

There are two modes of foreclosure; 1, a strict foreclosure; 2, a foreclosure and sale under a decree of the court.

1. A strict foreclosure is not of frequent recurrence. It usually happens when the mortgagee is in possession and he wishes the equity of redemption of the mortgagor to be barred. (*Bell v. The Mayor of New York*, 10 Paige, 49.) On a decree for a strict foreclosure, the mortgagor has no right to redeem after the day fixed for that purpose in the decree, and the lands become the absolute property of the mortgagee. It is said there can be no valid strict foreclosure against an infant heir of the mortgagor. (*Mills v. Dennis*, 3 John. Ch. 367.) A purchaser under a statute foreclosure may file a bill for a strict foreclosure, against junior incumbrancers having a right to redeem. (*Benedict v. Gilman*, 4 Paige, 58.)

On a strict foreclosure, if the mortgagor redeem, the mortgagee must account for the rents and profits received subsequent to the decree. (*Ruekman v. Astor*, 9 Paige, 517.)

At law it is well settled that a foreclosure of the mortgage is no bar to an action on the attendant bond. (*Hatch v. White*, 2 Gallison, 152.) In the case of *The Globe Ins. Co. v. Lansing*, (5 Cowen, 380,) the question was whether a foreclosure of the mortgage and a sale under it, operated as an extinguishment of the debt, and it was there held that it was an extinguishment no further than the amount produced by such sale. The same point was so decided in the court for the correction of errors, in the case of *Lansing v. Godlet*, (9 Cowen, 346, 403.) At the October term of the supreme court, 1829, it was held that the foreclosure of the mortgage premises with-

out a sale did not operate as an extinguishment of the debt, unless it was averred and proved that the mortgaged premises were of sufficient value to pay the debt. (*Spencer v. Harford*, 4 Wend. 384. *Morgan v. Plumb*, 9 Wend. 287.)

2. The other mode is by foreclosure and sale under the decree. This is the usual and preferable mode for all parties. The object in all cases of this kind is, or should be, to make the fund set apart for the payment of the debt available for that purpose, and to return the surplus, if there be any, to the mortgagor, or those who have succeeded to his rights. For this purpose, not only the parties to the mortgage are made parties to the action, but all persons having liens on the mortgaged premises, by mortgage or judgment, at the time of commencing the suit. No one can be bound by the decree who has not been made a party to the action. A junior incumbrancer may desire to redeem, and he should have the opportunity. And there are various reasons why prior incumbrancers should also be included. The purchaser can thus be enabled to acquire a title good against all the world; and a multiplicity of suits is avoided by bringing all before the court at once.

Prior to 1830, the mortgagee might pursue his remedy at law by action on the bond or other security, by action of ejectment to be let into possession of the mortgaged premises, and by bill in equity to foreclose. (*Dunkly v. Van Buren*, 3 John. Ch. 330. *Hughes v. Edward*, 9 Wheat. 489.)

This was often oppressive, and always attended with great expense. But now, by the revised statutes, the action of ejectment upon a mortgage is abolished. (2 R. S. 312, § 57.) If the creditor proceeds at law to recover the debt secured by the mortgage, he is forbidden to sell under his execution the equity of redemption in the mortgaged premises. And in order to guide the sheriff in this respect the plaintiff's attorney is required to make an endorsement on the execution, giving a brief description of the mortgaged premises, and directing the sheriff not to sell them. (2 R. S. 368, §§ 31, 32. *Delaplaine v. Hitchcock*, 6 Hill, 14.) If the mortgagee proceeds in equity to foreclose, no proceedings are thereafter to be had at law, without leave of the court. The court of equity has power to decree a sale of the mortgaged premises, or of so much thereof as may be necessary to discharge the amount due on the mortgage and the costs of the suit. It has power not only to compel the delivery of the possession of the mortgaged premises to the

purchaser, but to direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises in the cases in which such balance is recoverable at law; and for that purpose to issue the necessary executions, as in other cases, against other property of the mortgagor, or against his person. (2 R. S. 191, §§ 151, 152.) If the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a party to the action, and payment of any balance remaining after sale of the mortgaged premises may be decreed as well against such other person as the mortgagor. (*Id.* § 154. *Leonard v. Morris*, 9 Paige, 90.)

There are numerous cases where a court of equity affords the only remedy for the mortgage creditor. That is the case when the instrument contains no power of sale, or when the deed is absolute in terms, and is shown by parol proof to have been intended as a mortgage. The mortgaged premises cannot be sold in any such case on default of the mortgagor, without a decree in a foreclosure suit. (*Hart v. Ten Eyck*, 2 John. Ch. 62.) So also, when the mortgage is given to secure the performance of covenants or other thing than the payment of money. (*Ferguson v. Ferguson*, 2 Comst. 360.)

Cases often arise where there are successive mortgages on the same premises. They may become due at different times; and may each cover some premises not common to the other. But a court of equity can so mould the remedy as to do justice to all, and to prevent any one from squandering the fund intended for the benefit of the others also.

A subsequent mortgagee may file a bill to redeem a prior mortgage, and for a foreclosure and sale on both; or if the prior one be not due, for a sale subject to it. (*The Western Ins. Co. v. The Eagle Ins. Co.* 1 Paige, 284.)

But it is not always necessary that the junior mortgagee should offer to redeem the prior mortgage. He may, without such offer, file a bill of foreclosure and sale, and for payment of all incumbrances thereon out of the proceeds. (*Vanderkempt v. Shelton*, 11 Paige, 28.)

An equity of redemption is in some respects similar to a trust estate. The legal seisin is in its owner. He may alien it, devise it by will, and it is descendible to his heirs at law. It may be mortgaged. But a mortgage of this kind, usually called a second mortgage, is seldom recommended by English conveyancers, for two reasons:

1. Because a third mortgagee, *without notice*, may, by paying off the first mortgage, acquire a preference over the second. 2. Because great difficulties may arise in calling in the money; for as a second mortgagee has no legal remedy, he is driven to a bill in equity to recover even his interest. These reasons are not applicable in this state. The first arises out of the doctrine of tacking which is superseded in this state by our recording laws. (*Crabbe's Law of Real Property*, § 2256.) Each security is to be paid off according to its priority. (*McKinstry v. Mervin*, 3 *John. Ch.* 466.) The recording of the security is *notice* to all the world; and hence a third mortgagee cannot, by purchasing the first mortgage, squeeze out the second. The other objection to a second mortgage, that the holder of it is driven into equity for redress, applies in this state to all mortgages; it being the evident policy of our law to adjust the rights of the parties in all cases in a court of equity. The principal objection to a second mortgage is that unless the security is abundantly ample, the mortgagee may be compelled to take the premises and pay off the first mortgage, or hunt up a purchaser who will take the premises and pay off both.

The owner of the equity of redemption in the mortgaged premises is a necessary party to an action for the foreclosure of the mortgage. Where, therefore, the mortgagor has conveyed his equity of redemption to another, no suit in equity can be instituted against the mortgagor for the payment of the mortgage debt, without making the grantee of the equity of redemption a party. (*Reed v. Marble*, 10 *Paige*, 409.)

An equity of redemption is subject to the curtesy of the husband. (*Casborne v. Scarfe*, 1 *Atk.* 603, and see *ante*.) It is also subject to the dower of the wife against all but the mortgagee or those claiming under him. (*Collins v. Torry*, 7 *John.* 278. *Coles v. Coles*, 15 *id.* 319. *Van Dayne v. Thayre*, 14 *Wend.* 233, 19 *id.* 162.)

As the whole of a man's estate, whether it be real or personal, is, on his death, liable to the payment of his debts, the equity of redemption may be sold for that purpose, under appropriate proceedings, and the purchaser become the owner of it subject to the mortgage. (*Willard on Ex'rs*, 323.)

Any subsequent incumbrancer, whether by judgment or mortgage, has a right to redeem. In case premises are sold under a junior incumbrance, the purchaser of the mere equity of redemption is pre-

sumed only to bid to the value of such equity of redemption beyond the amount of the previous specific liens upon the premises. He takes the property, therefore, subject to those liens; and the property becomes the primary fund for the discharge of those liens. Equity will not permit such purchaser to keep the land, at the price thus bid, and resort to the personal liability of the mortgagor to satisfy the amount of such specific lien. If, in such a case, the mortgagor is compelled to pay the prior mortgage, he will, in equity, be subrogated to the rights of the first mortgagee, and will have the right to an assignment of such prior bond and mortgage, to enable him to reimburse himself from the fund in the hands of such purchaser of the mortgaged premises. (*Vanderkemp v. Shelton*, 11 Paige, 28. *Tice v. Annin*, 2 John. Ch. 128. *Heyer v. Pruyn*, 7 Paige, 470.)

The New York statute, we have seen, authorizes the court to decree a sale of the mortgaged premises, whether the mortgage contains a power of sale or not, and to direct the payment of the unsatisfied balance, when such balance would be recoverable at law. It thus accomplishes the whole in one action. Various questions arise in the exercise of the powers of the court in these cases, which have generally been settled upon wise and comprehensive principles of natural equity. Thus, where the mortgaged premises are incapable of being sold in parcels, or of being divided without injury, the whole may be sold, though the whole debt is not due; and the proceeds applied to pay the interest and costs, and the surplus to the principal of the debt. (*Campbell v. Macomb*, 4 John. Ch. 534.)

Sometimes it is not necessary to anticipate the whole debt on the sale for an installment, in which case a provision should be made to render further litigation unnecessary. Thus, when the interest on a mortgage is payable annually, and the principal at a future period, on a bill for a foreclosure and sale for the non-payment of the interest, the whole subject is usually brought before the court on the report of a master under the former practice, or of a referee under the present mode, as to the situation of the premises, and whether they can be sold in parcels or not, and stating such other facts as may be essential to aid the court in its determination of the matter; when the whole or a part of the mortgaged premises will be sold, as the court may deem just and necessary. In case it be unnecessary to sell the whole, the decree of sale and foreclosure will stand as further security for the payment of future installments of principal and interest, as they become due. An order will be obtained, from time

to time, for future sales, on the foot of the decree, and obtaining a further report of the amount due. (*Brinkerhoff v. Thalhimer*, 2 *John. Ch.* 486. *Lyman v. Sale*, 2 *id.* 487.)

We have already alluded to cases where the land becomes the primary fund for the payment of the debt secured by mortgage. Though, in general, the debt is the principal and the mortgage the incident, or the security, the parties may by their dealings reverse this order; in which cases equity compels the parties to their agreement. This is sometimes by express agreement. Where land is expressly conveyed, subject to a mortgage thereon, the land is the primary fund, as between the grantor and grantee, and those deriving title from the grantor, for the payment of the mortgage debt. (*Jumel v. Jumel*, 7 *Paige*, 591.) On the same principle, where a mortgagor sells part of the land subject to the whole mortgage, the part sold is liable primarily for the mortgage debt, and the personal estate of the deceased grantee is liable only for the deficiency. (*Halsey v. Reed*, 9 *id.* 446.)

It is often an important inquiry to ascertain the order in which successive mortgages shall be paid off, where the premises charged by the mortgage have been sold at different times and to different parties. The general rule is that the different parcels should be charged with the incumbrance in the inverse order of their alienation. (*Clowes v. Dickinson*, 5 *John. Ch.* 235. *Schryver v. Teller*, 9 *Paige*, 173.) The principle is the same where there are general liens upon the whole land, and subsequent mortgages on the parcels, the general liens are primarily chargeable on the parcels in the inverse order of their being mortgaged. (*Schryver v. Teller*, *supra.*)

So when lands belonging to several persons are covered by a mortgage given by one from whom they all derive their title, the several parcels must be sold in the inverse order of their alienation. And where the purchase money has been paid in good faith, the first purchaser has the prior equity, although the consideration was not actually paid until other portions had been actually purchased and paid for. (*Grosevenor v. Lynch*, 2 *Paige*, 300.)

The same doctrine applies where mortgaged premises are sold subsequent to the date of the mortgage to different purchasers; such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation, according to the equitable rights of the different purchasers, as between themselves. (*Guion v. Knapp*, 6 *Paige*, 35. *Snyder v. Stafford*, 11 *id.* 71. *The New York Life*

Ins. and Trust Co. v. Milnor, 1 Barb. Ch. 353. *Stuyvesant v. Hall*, 2 id. 151. *Skeel v. Spraker*, 8 Paige, 182.)

Under this head of *foreclosure* and sale, the question often arises as to the mode of computing interest on the security, and which must necessarily be settled by the court, when it pronounces the decree. It is a general rule that interest upon interest, or compound interest, is never allowed; except in special cases, or when there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose subsequent to the original contract, or a master's report, computing the amount of principal and interest has been confirmed. (*The State of Connecticut v. Jackson*, 1 John. Ch. 13. *Van Benschoten v. Lawson*, 6 id. 313. *Toll v. Hiller*, 11 Paige, 328.) Though an agreement in advance, to pay interest upon interest, is not usurious, still it cannot be enforced. An agreement to pay interest on interest which has accrued, is valid. (*Mowry v. Bishop*, 5 Paige, 98.) If compound interest is voluntarily paid, it cannot be recovered back. (*Id.*) But otherwise when paid ignorantly, upon the faith of a calculation made by a third person. (*Boyer v. Park*, 2 Denio, 107.)

The improvements of modern times have given rise to modes of acquiring and transferring property, and of securing debts by mortgages thereon, not contemplated in the early stages of the common law. Rail roads could never have been constructed, upon an extensive scale, but by an aggregation of capital in corporate hands; and the necessary real estate could never have been acquired without the aid afforded by government by the qualified assignment of its right of eminent domain. (*Beekman v. Saratoga and Schenectady Rail Road Co.* 3 Paige, 45. *Polly v. Saratoga and Washington Rail Road Co.* 9 Barb. 449. *Adams v. Same*, 11 id. 414. 4 Seld. 58, *remarks in do.*) Nor could the requisite funds have been borrowed but by occasionally mortgaging the real estate and franchises of the corporation. In this state, the mode of acquiring the real estate essential for the purposes of the corporation, when the parties fail to agree, is pointed out in the general act relative to rail road corporations, and the acts amending the same. (*Act of 1850, ch. 140; 1851, ch. 19; 1853, ch. 53; 1854, ch. 282.*) Among the powers of the corporation formed for this purpose, is that of borrowing such sums of money as may be necessary for completing and finishing, or operating their rail road, and to issue and dispose of their

bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company, for the purposes aforesaid. (*Laws of 1850*, § 28, *sub. 10*, *p. 225*.)

The usual mode is for the corporation, after determining upon the terms of the proposed loan, to execute a mortgage of its real estate and track, by a description sufficiently definite to identify it, together with its franchises, to one or more gentlemen in trust for the bondholders, by whom the money is advanced. The mortgage must be proved or acknowledged in due form, and recorded in the several counties through which the road is laid. It prescribes the time and manner of payment. (*Seymour v. The Canandaigua and Niagara R. R.* 25 Barb. 284.)

The *franchise* of the corporation thus allowed to be mortgaged is the attribute of continual succession, derived from the charter ; the right to have a name and common seal ; to sue and be sued ; to make by-laws ; to have capacity to transact business, &c. (1 *R. S.* 599.) These are the common law attributes of a corporation ; and are expressly declared by statute to be applicable to the corporations in this state. By authorizing the corporation to mortgage this franchise, the statute, in effect, authorizes a transfer of it to the purchasers, on the sale under the foreclosure of the mortgage. The latter thus become the owners of the property, with all its corporate privileges.

It is competent for a rail road to mortgage its real estate, track and fixtures, without its franchises. (*Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 484, *where the rolling stock was held to be fixtures of the road*.) In such a case the purchaser, on a foreclosure sale, could acquire nothing not embraced in the mortgage. *Prima facie*, the real estate and franchises would, in such a case, be separated from each other, and be of little value to any one. The act of 1854, amending the general act, provides for such a case, and authorizes the purchaser or purchasers and their associates to make and acknowledge and file articles of association, as prescribed by the general act, and thereupon to be a corporation, with all the powers, privileges and franchises, and be subject to all the provisions of the act. (*Laws of 1854*, § 5, *p. 608*.) There are some advantages in forming a new corporation with the property acquired by such purchase ; a new name can be taken. It is presumed that this course can be adopted, even if the franchise be mortgaged with the

track and other property ; and it is the only remedy where the franchise was not included in the mortgage.

A corporation is not *ipso facto* dissolved by the sale of its property, effects and charter. (*Wilde v. Jenkins*, 4 Paige, 481. *Mickles v. The Rochester City Bank*, 11 *id.* 118. *The People v. Mauran*, 5 Denio, 389.) Some action of the courts, decreeing a dissolution, is required for that purpose. But the title of the purchaser in good faith, under the foreclosure and sale, will not be affected by the subsequent action of the courts against the original corporation.

The decree of foreclosure of a mortgage of a rail road and its franchises usually makes provision for the purchase by some one in trust for the bondholders, in case other purchasers should not bid a larger sum. The sale in such a case does not take place under a power of sale, but by virtue of the decree of the court.

The effect of a foreclosure sale is to cut off all liens, whether by judgment, mortgage or otherwise, which accrued subsequent to the mortgage under which the sale is made. The creditors at large of the company have no remedy against the purchaser under the foreclosure sale, or against the new company to be formed. Their remedy exists against the old company, which they may pursue to judgment. The incumbrances on the road must be paid off according to their priorities.

The legislature in this state has provided for the taking the lands of individuals for the purpose of constructing plank roads and turnpike roads. (*L. of 1847, ch. 210.*) The general act does not authorize those companies to mortgage their roads or their franchises for the security of their creditors. But the legislature have repeatedly, by special acts, authorized such companies to borrow money, on the bond of their officers, and in some instances have created a lien upon the road as a security for such indebtedness. (*L. of 1851, ch. 13, p. 15.*) They have in other instances authorized the officers of the road to mortgage their corporate rights and franchises for a limited amount, and provided that on a sale by virtue of a foreclosure of the mortgage, the corporate rights and franchises of the road should vest in the purchasers, and that the corporation should not be deemed thereby dissolved. (*L. of 1851, p. 165.*)

As these different roads are usually provided for by separate and often conflicting legislation, it is not deemed expedient to collect and arrange the several acts. We have only attempted to state the general usage in the case of foreclosures and sale.

There is another class of liens, which have been created by the legislature in favor of certain mechanics, at first in some, but now in all of the counties of the state, for which the conveyancer must make search if he wishes to secure for his client an unincumbered title. These various acts are collected in the third volume of the revised statutes, 5th edition, from page 802 to 828. It will be seen that the provisions of the act of April 17, 1854, page 1086, are extended and declared to be applicable to all the counties of this state, except the counties of New York and Erie, (*L. of 1858, p. 324*), for which provision had already been made.

These lien laws have been confined to the subjects named in the act, and therefore, when the provisions of the act authorizing a lien in favor of mechanics for work performed towards the *erection, construction or finishing of buildings*, it was held that they did not apply to the flagging of side walks, yards, and areas of buildings, in the process of erection. (*McDermott v. Palmer*, 4 *Selden*, 383.)

These statutes have given rise to numerous questions, and still more will constantly arise. It is not possible for any legislation so novel in its character, to be perfect at once, or to attain the objects which its framers had in view. One object of these laws is to enable the mechanic doing labor on a building erected under a contract with the owner, to reach the fund due from the owner to the contractor. The remedy, say the court, which the statute gives, is against money due to the principal contractor for the work which he agreed to do, but which the subcontractor or mechanic has actually performed for him. It does not extend to money payable to the contractor on any other account. It is quite reasonable that the party meritoriously entitled to be paid for the work should be allowed to intervene between the owner for whom a house was built and the person who had contracted to build it, and to divert the course of the payments, which would have passed into the hands of such contractor, to his own. It is a form of equitable subrogation, regulated by statute, but it is limited to the plain case of money due upon a contract for performing the work. (*Loonie v. Hogan*, 5 *Seld.* 440, *per Denio, J.*)

Hence, when the owner of a lot in the city of New York contracted with a purchaser to convey the lot to him for a certain sum, and to loan him money in installments for the erection of a building thereon, the price of the money lent to be secured by bond and mortgage upon the premises at the completion of the building, at which time

the lot was to be conveyed, it was held that the seller of the lot was not "the owner of the building," within the meaning of the mechanics' lien act, although it was erected on lands of which he had the legal title. The persons furnishing materials for such building could not, under that statute, compel payment for those materials out of the money agreed to be advanced by the seller to the purchaser. (*Id.*)

Under the act of July, 1851, ch. 513, which relates to the city and county of New York, and which superseded the prior laws on the subject, the notice of the claim must be filed within six months after the performance of the labor or the furnishing of the materials by the contractor, subcontractor, laborer, or person furnishing the materials. (*Id.* § 6.) The filing of this notice in the proper office is the commencement of the lien, and it cannot be created in any other way. (*Donaldson v. O'Connor*, 1 *Smith's N. York C. P.* 695.)

The lien thus created does not continue after one year has elapsed from the filing of the claim, unless in the mean time proceedings are instituted for its enforcement; in which latter case it continues until judgment. (*Laws of 1851*, §§ 11, 12, p. 956.)

A variety of questions have arisen under the above act, many of them have been ably discussed and decided in the New York common pleas, but they do not appertain to the subject of this treatise. (*See Smith's Reports, N. Y. Common Pleas.*)

There are, in several of the other states, similar laws giving a lien to certain mechanics and material men for work and labor and for materials found in the construction and repairing of buildings. These statutes have led to some litigation, but the questions involved do not fall within the scope of this work.

There is another species of lien on real estate more general in its nature, arising from the judgment of the court, and it is regulated in this state by statute. It does not of itself transfer the title of the lands bound by it, or destroy the seisin of the defendant. (*Sedgwick v. Hallenbeck*, 7 *John.* 376.) It will attach on lands of which the judgment debtor becomes seised at any time after the judgment, unless his seisin was instantaneous, or departed from him, *eo instanti* that he acquired it. (*Per Spencer J. in Stow v. Tiff*, 15 *John.* 459, 464.) At law a judgment cannot attach upon a mere equity, (*Jackson v. Chapin*, 5 *Cowen*, 485,) nor in equity upon a mere legal title, when the purchaser under it has notice of the equitable title. (*Ells v. Tousley*, 1 *Paige*, 280.)

The subject of judgments and their effect as liens was very fully considered by the chancellor, in *Buchan v. Sumner*, (2 Barb. Ch. 193 *et seq.*) Previous to the revised statutes of 1830, he observes, a judgment in a court of record in this state was a lien upon the lands of the judgment debtor from the time of the entry of such judgment, whether docketed or not. But by the statute then in force, if the judgment was not properly docketed, it did not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees. (1 *R. L.* of 1813, p. 501, § 13.) Even as to them, however, the undocketed judgment was entitled to priority in equity, if the purchaser or mortgagee had notice of its existence at the time of his purchase, or when he took his mortgage. (*Davis v. The Earl of Strattsmore*, 16 *Ves.* 420.) That statute made no provision for priority in favor of the lien of subsequent judgment creditors. The first judgment, although not docketed, was therefore entitled to a preference over the lien of a junior judgment, which had been docketed as directed by the statute. But if the land of the debtor had been sold by the sheriff, under an execution upon the junior judgment, to a purchaser who was ignorant of the existence of the prior docketed judgment, such purchaser took the land discharged of the lien of the undocketed judgment.

The revised statutes of 1830 made a very material alteration in the law relative to the lien of judgments. The 12th section of the title in relation to judgments (2 *R. S.* 360) declares that no judgment shall affect any lands, tenements, real estate or chattels real, or have any preference as against *other judgment creditors*, until the record thereof shall be filed and docketed, as therein directed. The effect of this provision appears to be to prevent the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been docketed; and not merely to protect bona fide purchasers and incumbrancers, who had no notice of the existence of the judgment when their interests in, or liens upon, the real estate of the judgment debtor accrued. The same policy was carried out in the act of the 14th May, 1840, (*Laws of 1840, ch. 386, § 25, p. 334,*) the 25th section of which declares that no judgment or decree, which should be entered after that act took effect, should be a lien upon real estate, unless the same should be docketed in books provided for that purpose by the county clerk of the county *where the lands are situate*. The existing law, as prescribed by the code of 1851, § 23, (5 *R. S.* 545, 5th ed.)

is substantially the same. It provides that on filing a judgment roll, directing in whole or in part the payment of money, it may be docketed with the clerk of the county where it was rendered, and in any other county, upon filing with the clerk thereof a transcript of the original docket, and it is made a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered.

The code of procedure, (§ 63,) also provides for docketing the judgment rendered by a justice of the peace, when the amount of the judgment exceeds twenty-five dollars, by filing and docketing a transcript of the judgment in the office of the clerk of the county where the judgment was rendered. From the time of the receipt of the transcript the judgment is treated as a judgment of the county court. A certified copy of this transcript may be filed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien, only from the time of filing and docketing the transcript. The lien of such a judgment on real estate is coextensive with that of a judgment of the county court. (*Waltermire v. Westover*, 4 Kern. 16. *Crippen v. Hudson*, 3 id. 161. *Dickinson v. Smith*, 25 Barb. 102.)

A judgment does not lose its lien upon real estate by the suffering of an execution issued thereon to lie dormant in the sheriff's hands. The doctrine on the subject of dormant executions does not apply to real estate; the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy. And such lien does not become dormant until the expiration of the statutory limitation of ten years. (*Muir v. Leitch*, 7 Barb. 341.)

Since the act of 1840, judgments are liens upon real estate only when docketed in the offices of the clerks of the counties where the premises are situated. (*Johnson v. Fitzhugh*, 3 Barb. Ch. 360.) Judgments of the supreme court prior to the act of 1840 are not affected by it, and such judgments continue a lien upon lands throughout the state, though they have been revived by scire facias since that act took effect. (*Clark v. Dakin*, 2 Barb. Ch. 36.)

The lien of a judgment ceases absolutely, after the lapse of ten

years from its docketing, as against subsequent mortgages, judgments or other incumbrances; and as to them, the question of notice, actual or constructive, cannot arise. (*Little v. Harvey*, 9 *Wend.* 157.) And it seems that all purchasers are to be considered purchasers in good faith within the meaning of the act on this subject, except those who purchase with an *actual fraudulent intent*. And it does not alter the case that they purchased during the ten years, and with knowledge of the judgment. (*Tufts v. Tufts*, 18 *Wend.* 621. *Lansing v. Vischer*, 1 *Cowen*, 431. *Crosier v. Arer*, 7 *Paige*, 137.)

The judgments of which we have been speaking are judgments of the courts of this state. As there is no act of congress making a judgment in a court of the United States a lien upon lands, either within the general territorial jurisdiction of the court or elsewhere, the existence of such a lien must depend upon the local law of the state where the land is situated upon which such a lien is claimed. (*Taylor v Thompson's Lessee*, 5 *Peters*, 358. *Manhattan Co. v. Evertson*, 6 *Paige*, 467.) A judgment recovered in the district or circuit court of the United States for the northern or southern district of the state of New York is a lien upon lands throughout the state, for the term of ten years from the time of docketing such judgment, in conformity to the local law of the state. (*The Manhattan Co. v. Evertson*, *supra*.) But it seems that a judgment in favor of the United States, recovered in one of the federal courts *out* of the state of New York, is not a lien upon lands within that state from the docketing of the judgment; although by the law of the United States, an execution on such judgment may be issued against the defendant's property in any state of the Union.

If the lien of the judgment was coextensive with the right to issue execution, the recovery of a judgment in favor of the United States in the district of Louisiana, if duly docketed, would create a lien upon the lands of the debtor heir; so that no purchaser could consider himself safe in purchasing lands within the state until he had searched the records of every federal court throughout the whole extent of the Union. But a different rule prevails. The judgment of the federal court, to be a lien on the lands of the debtor in this state, must be a judgment of one of the federal courts within this state. (*Id.*)

There are other securities which become a lien on real estate. Thus, every person chosen or appointed to the office of collector, before he enters on the duties of his office, and within eight days after

he receives notice of the amount of the taxes to be collected by him, is required to execute to the supervisor of the town and to lodge with him, a bond, with one or more sureties to be approved by such supervisor, in double the amount of such taxes, conditioned for the faithful execution of his duties as such collector. (1 *R. S.* 346, § 19.) The supervisor is required to file such bond, with his approbation indorsed thereon, in the office of the county clerk, who is required to make an entry thereof in a book to be provided for that purpose, in the same manner in which judgments are entered of record. Every such bond is declared to be a lien on all the real estate held jointly or severally by the collector or his sureties within the county, at the time of the filing thereof, and to continue such lien till its condition, together with all costs and charges which may accrue by the prosecution thereof, shall be fully satisfied. (*Id.* § 20.)

In the general act relative to villages, all taxes levied by virtue of the act are made a lien upon the real estate upon which they shall be assessed. (2 *id.* 712, 5th ed.)

Taxes charged on lands returned to the comptroller, and the interest thereon, are a lien upon such lands, and after remaining unpaid for two years from the first day of May following the year in which they were assessed, that officer is authorized to proceed to advertise and sell the land in the manner pointed out by law. (1 *R. S.* 930, 5th ed.) It is on this principle that taxes assessed on the estates of deceased persons previous to their death are entitled to priority of payment over debts due to individuals. (2 *id.* 87.)

Taxes imposed by the United States are a lien upon the real estate, and these, together with debts due to the government, are entitled to priority of payment in administering the estates of deceased persons; (2 *R. S.* 87;) but in the case of debts due to the government no lien is created, which will overreach a bona fide transfer of property in the ordinary course of business. It is a mere priority of payment, as among the creditors of a common debtor. (*United States v. Fisher*, 2 *Cranch*, 358.)

CHAPTER VI.

OF ESTATES IN EXPECTANCY.

SECTION I.

Of remainder, generally.

Estates, when considered with respect to the time of their enjoyment, are divided into estates in possession, and estates in expectancy. (1 *R. S.* 722.)

An estate in possession is when the owner has an immediate right to the possession of the land. It is sometimes spoken of as an estate *executed*, when there is a present and immediate right of present or future enjoyment. (1 *Prest. on Est.* 62.) In this sense it applies to vested estates as distinguished from such as are contingent.

An estate in expectancy is when the right to the possession is postponed to a future period. (1 *R. S.* 723.) And in the revised statutes it is divided into 1. Estates commencing at a future day, denominated future estates; and 2. Reversions. (*Id.*) The first are created by the act of the parties; and the second by the act of the law.

Previous to 1830, the law on this abstruse branch of our jurisprudence was formed upon the model of the English law. We were governed by the common law. The revisers, as they tell us in their notes, (3 *R. S.* 570, 571, 2*d ed.*) with a view to extricate this branch of the law, from the perplexity and obscurity in which it was then involved, and render a system simple, uniform and intelligible, which, in its then present state, was various, complicated and abstruse, proposed certain alterations which were substantially adopted by the legislature. After pointing out some of the refinements and subtleties of the English law in this respect, they suggested that the obvious and effectual remedy was to abolish all technical rules and distinctions, having no relation to the essential nature of property, and the means of its beneficial enjoyment, but which, derived from the feudal system, rested solely upon feudal reasons; to define with precision the limits within which the power of alienation might be suspended by the creation of contingent estates, and to reduce all

expectant estates substantially to the same class, and to apply to them the same rules whether created by deed or devise.

By the term *a future estate*, the legislature intended not only to embrace *remainders*, properly so called, but also springing and secondary uses, and executory devises, and to bring them all under the same rule.

In considering these provisions of the revised statutes it is necessary to understand the law as it stood antecedent to these enactments. We cannot otherwise comprehend the nature and importance of the changes.

At common law an estate in remainder was defined to be an estate to take effect and be enjoyed after another estate was determined. As if a man seised in fee simple, grants lands to A. for a term of years, or for life, and after the determination of the said term, then to B. and his heirs forever; these two interests, for many purposes, constitute but one estate. By uniting in a conveyance to a third person in fee, the estate of A. and B. become consolidated into one estate in their grantee. (2 *Black. Com.* 164. *Crabbe on Real Estate*, § 2323.)

In the words of Lord Coke, a remainder is a residue of an estate in land depending upon a particular estate, and created together with the same at one time. (1 *Inst.* 49 a.) The validity of a remainder depended, at common law, upon a few general rules: 1st, there must be a particular estate, precedent to the estate in remainder; 2d, it must commence or pass out of the grantor at the same time of the creation of the particular estate; and 3d, it must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determined. These were elementary principles in the law of remainder. In addition to which it may be said that a remainder in fee could not be created after another estate in fee, and be valid as a remainder.

The revised statutes so changed the law that a future estate could be limited to take effect without the intervention of a precedent estate. They define a future estate, to be an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time. (1 *R. S.* 723, § 10.) The subsequent section states, that where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

In a case contemplated by the 11th section, it is presumed that the term remainder has its common law meaning, and that it is not valid as such remainder, unless the precedent estate by which it is upheld is something more than a mere estate at will. (*Lord Stamford's case*, 8 Co. 75 a.) An estate at will is of too frail a nature to uphold an estate in remainder. Such estate cannot be sold on execution. (*Bigelow v. Finch*, 11 Barb. 498. *S. C.* 17 id. 394. *Post v. Post*, 14 id. 257, *per Hand, J.*) A remainder upheld only by an estate at will, would be void in its creation.

It was a principle of the common law, that when the particular estate was defeated, the remainder was thereby defeated also. There were some exceptions to this rule. When the particular estate and the remainder depended upon one title, the defeating of the particular estate would be a defeating of the remainder. But when the particular estate was defeasible, and the remainder by good title, then, though the particular estate be defeated, the remainder was good. (*Co. Litt.* 298 a.)

Though an estate may not be good as a *remainder*, when the particular estate is void or is defeated, it is believed that it may be good as a *future* estate, within the meaning of the tenth section. If such an estate could be created without the intervention of a particular estate, no reason is perceived why it should be defeated by the failure of such estate.

Upon the rules which have been stated as to the validity of remainders, the doctrine of contingent remainders sprung up. The policy of the revised statutes was to apply to *future estates* generally, the doctrines which, at common law, were applicable to remainders. As remainders were vested and contingent, so it was proper to declare that *future estates* should be either vested or contingent. They are vested where there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. (1 *R. S.* 723, § 13.) This definition seems to have been taken from the systematic writers on the subject of remainders. Mr. Cruise, whose work was before the revisers when they framed the statute we are considering, speaks of *vested remainders*, or remainders executed, as he calls them, as those by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to re-

main to a determinate person after the particular estate is spent. Mr. Fearne, whose valuable treatise on this subject is often cited by the revisers, says, an estate is *vested* when there is an immediate fixed right of present or future enjoyment. An estate is *vested in possession* when there exists a right of present enjoyment. An estate is *vested in interest* when there is a present fixed right of future enjoyment. An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain. (*Cruise's Dig. title 16, Remainder, ch. 1, § 8 and notes, Greenleaf's ed.*) To the same effect is Mr. Preston: An estate executed, is, says he, when there is a present and immediate right of present or future enjoyment. Every estate which is executed, necessarily gives a vested interest. Whether the estate be executed in possession or merely in interest, and not in possession, will depend on the circumstances of its conferring a right of present or future enjoyment. When the right of enjoyment in possession is to arise at a future period, the estate is *executed only*; that is, vested only in point of interest; and when the right of immediate enjoyment is annexed to the estate, then only is the estate executed in possession. (1 *Preston on Estates*, 62.)

The term *vested* is used by all these writers, as it is also by the statute, in opposition to contingent.

The statute we have seen states that estates are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. A remainder, says Mr. Cruise, is contingent when it is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate, in which latter case, at common law, such remainder could never take effect. Mr. Fearne reduces the various contingent remainders to four kinds: 1st. When the remainder depends entirely on a contingent determination of the preceding estate itself. The second is when some uncertain event, unconnected with and collateral to the determination of the preceding estate, is by the nature of the limitation to precede the remainder. The third is when it is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate, in which latter case the remainder becomes void at common law. And fourth, when it is

limited to a person not ascertained, or not in being at the time such limitation is made.

SECTION II.

Of Contingent Remainders.

Having stated, in the preceding section, some general views with respect to future estates, and especially as to vested and contingent remainders, it is proposed, in the present section, to enlarge upon the subject and to give some illustration of the rules which have been proposed by authors on this interesting subject. The case put by Mr. Fearne, by way of illustration of the first case, is, if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C., then to remain over in fee; where the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect; but that is an effect which possibly may never happen; therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. (*Cruise, title 16, ch. 1, § 11.*)

A testator by his will made in 1792, after giving all his personal estate to his wife, gave to her all his real estate in fee, except two lots of land in the city of New York. Those parcels he devised to his wife for life, and after her death, in case her daughter, an only child, should die without having married, or without having any child or children, one parcel to his nephew William, and the other to his nephew Henry. The daughter survived the mother, but afterwards died without issue. It was held by the court of appeals that by the will the nephews took contingent remainders in fee, which would take effect only in case the daughter died childless, *during the life of the widow*; that the daughter, in the meantime, took the fee by descent; and, on her surviving the widow, the remainder fell, and she became entitled to the premises absolutely. (*Wolfe v. Van Nostrand, 2 Comst. 436.*)

In this case it was contended, by the counsel for the nephews, that they took a contingent estate by way of executory devise. But the court held otherwise; adopting the inflexible rule of law, that a future interest capable of taking effect as a contingent remainder, shall never take effect as an executory devise. The remainder to the nephews was supported by the life estate to the widow. It was to take effect in *interest* upon the death of the daughter without chil-

dren during the life of her mother; and in *possession* on the death of the latter. The fee in the mean time descended to the daughter, as heir at law to her father. She having survived her mother, the remainder fell with the freehold estate upon which it was dependent, to wit, the life estate of the mother, and she thus became entitled to the premises absolutely. The remainder to the nephews was contingent on the determination of the preceding estate, the life estate to the widow.

The second proposition of Mr. Fearne is taken from the case put by Coke. (1 *Inst.* 378 *a.*) If a man make a lease for life to A., B. and C., and if B. survive C. then the remainder to B. and his heirs. Here the want of B.'s surviving C. does not affect the determination of the particular estate; but it must precede and give effect to B.'s remainder; and as such an event is dubious, the remainder is contingent. It is a common possibility that one man may die before another, and it is therefore an event upon which a remainder may commence upon limitation of time.

Where a remainder in fee was limited by the will to the eldest son of the first taker to whom an intermediate life estate was given, the remainder was held to be contingent until the birth of such son; but on the happening of that event before the termination of the life estate, it became a vested estate in remainder. And where an estate tail in remainder was so limited, and became vested by the birth of a son prior to the act of 1786, abolishing entails, it was held that by the operation of that act the estate tail in remainder was converted into a fee simple in remainder, which on the death of the remainderman without issue in 1809, and before the determination of the intermediate life estate, descended to his father as his heir at law. A party who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law where the estate was acquired by purchase, as will constitute him a *stirpes*, or stock of descent. (*Wendell v. Crandall*, 1 *Comst.* 491; *S. C.* 2 *Denio*, 9.)

In the foregoing case the testator devised certain real estate to trustees in fee for and during the life of his grandson Mathias, the eldest son of the testator's son Dick, to support contingent remainders in his will, so that they might not be destroyed, but in trust nevertheless to permit and suffer him to receive the rents and profits thereof to and for his own use during his natural life, *and from and after his decease*, he devised the same to the first son of the body

of the said Mathias, lawfully issuing, born or unborn, and to the heirs male of the body of such first son, lawfully issuing; and for the default of such issue, then likewise to the second, third, and every other son of the said Mathias successively, &c. Dick, the eldest son of Mathias, the grandson of the testator, was born in 1783, and died in 1809; both events having happened while the life estate was running which did not terminate until 1825. On the birth of Dick, his remainder, which was before contingent, became vested in interest, and he was seised of an estate tail in remainder. Although he neither had possession, nor the right to immediate possession, he had a fixed right of future enjoyment the moment the life estate should come to an end. Such was the state of the case at the time the act of 1786 was passed, the effect of which was to turn the estate tail into an estate in fee simple. The tenant in tail thus becoming, by force of the statute, a tenant in fee simple, and having acquired the estate by purchase, constituted a new stock of descent, from whom the lands might go according to the law of descents, instead of following the form of the gift in tail. (*Wendell v. Crandall, supra, per Bronson, J.*)

The uncertain event in the above case was the birth of Dick, a matter unconnected with and collateral to the determination of the preceding estate.

The third kind of contingent remainder, mentioned in the preceding section, is when the remainder is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate, in which latter case the remainder becomes void at common law; because, at common law, the remainder must vest either during the continuance of the particular estate or at the very instant of its determination. This kind of remainder was thus illustrated by Coke: If, says he, a lease be made to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder is contingent; for though J. D. must die some time or other, yet he may survive J. S. by whose death the particular estate will determine, and the remainder become void. (*Boraston's case, 3 Coke, 20 a.*)

This class of remainders seems to be included in the provisions of the revised statutes to prevent the defeat of contingent remainders in certain cases. It is there enacted that no remainder, valid in its creation, shall be defeated by the determination of the precedent

estate, before the happening of the contingency on which the remainder is limited to take effect ; but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period. (1 *R. S.* 725, § 34.)

The fourth kind of contingent remainders, alluded to in the preceding section, is when it is limited to a person not ascertained, or not in being at the time such limitation is made. Thus, according to Coke, if a lease be made to one for life, remainder to the right heirs of J. S. ; now there can be no such person as the right heir of J. S. till his death, for *nemo est hæres viventis* ; and J. S. may not die till after the determination of the particular estate ; therefore such remainder is contingent. (1 *Inst.* 378 *a.*) So when an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive. (*Cruise's Dig. Remainder*, ch. 1, § 21.)

The foregoing classification, derived from Mr. Fearne, is followed by Mr. Cruise, and by other writers. But it is too refined for practical use. The division of the subject, by Blackstone, is more in harmony with the truth, and sufficiently minute for all purposes. He embraces all under two classes, namely, such as are limited to take effect to a dubious and uncertain *person*, or upon a dubious and uncertain *event*. (2 *Bl. Com.* 169.) It is manifest that the legislature had this classification in view, in framing their definition of a contingent remainder. After declaring that an estate is vested when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate, they enact that remainders are contingent whilst the *person* to whom, or the *event* upon which they are limited to take effect, remains uncertain. (1 *R. S.* 723, § 13.) They obviously designed to bring all contingent remainders under one or the other condition, as depending upon the uncertainty of the *person*, or of the *event* ; and this seems to be the more natural and philosophical division of the subject.

It was a principle of the common law that no contingent remainder, amounting to a freehold, could be limited on an estate for years, or on any other particular estate less than a freehold. The reason was, that unless the freehold passed out of the grantor at the time when the remainder was created, such freehold remainder was void.

Hence, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder was void. But if granted to A. for life, with a like remainder, it was good. (*Chudleigh's case*, 1 *Coke*, 130 *a.*) In the first case the freehold could not vest in the particular tenant as he had only an estate for years; in the second case, as the particular tenant has an estate of freehold, the remainder in fee, as it passes out of the grantor, can vest in the particular estate, which is one of freehold.

These rules are modified by the revised statutes. A contingent remainder may now be created on a term of years, if the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. (1 *R. S.* 724, § 20.) And an estate for life may be limited as a remainder on a term of years, if made to a person in being at the creation of such estate, and not otherwise. (*Id.* § 21.)

The power of alienation of an estate is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. It is the policy of the law, and it is thus enacted, that every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than that prescribed in that article. (1 *R. S.* 723, § 14.) The following section enacts that the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being, at the creation of the estate, except in the single case mentioned in the 16th section. That section permits a contingent remainder in fee to be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain the full age.

The power of alienation has sometimes been attempted to be suspended or destroyed as well by *conditions* as by limitation; and the principle is the same whether the condition be inserted in a lease in fee reserving rent, or in an absolute conveyance. Thus, where the lessor, in a lease of lands in fee executed in 1785, reserved to himself, his heirs and assigns, in addition to the annual rent, the right to purchase the premises in case the lessee, his heirs &c. should choose to sell, on paying three quarters of the price demanded, the

lessee covenanting to make the first offer to the lessor, his heirs &c. upon those terms, and in case the offer should be declined, then the lessor reserved to himself, his heirs &c., one fourth part of all moneys which should arise from the selling, renting or disposing of the lands by the lessee, his heirs and assigns, when and so often as the same should be sold, rented or disposed of; with the condition that in case of a sale or other transfer, without the payment of such one fourth to the lessor, his heirs or assigns, the sale or transfer should be void, and the premises should revert to the lessor, his heirs and assigns, who might then re-enter upon the premises and repossess and enjoy the same as of his former estate, it was held by the court of appeals of New York that the reservation of the *quarter sales*, and the condition and right of re-entry, upon default of their payment were void. (*DePeyster v. Michael*, 2 *Seld.* 467.) The invalidity of the pre-emptive right of purchase by the grantor, and the reservation of a part of the purchase money, the quarter sales, were deemed repugnant to an estate in fee, as an illegal restraint upon the power of alienation. This doctrine has been repeatedly applied with reference to estates in fee, though similar conditions are not incompatible with estates for years or for life. (*Overbagh v. Patrie*, 8 *Barb.* 28.)

But the question has been more frequently agitated in other classes of cases, and perhaps oftener under wills than under other modes of conveyance. There is a strong propensity in the human mind to exercise an unlimited control over property by the owner during his life, and to clog and fetter the alienation of it after his death. To restrict this last propensity within reasonable limits has been the object of the legislature and the courts.

In *Amory v. Lord*, (5 *Seld.* 403,) the testator died, leaving a wife, children and grandchildren, having previously devised his real estate to his wife and two other persons, in trust, to receive the net income thereof, and apply it to the use of his wife during her life, or widowhood, and at her death or marriage to divide the same into as many shares as he should have children surviving him, the net income of one share to be received by each child during his or her life, and afterwards by his or her husband or wife during life or until marriage, and then the fee of each share to vest, absolutely, in the children of each child, if any, and if none, then in the right heirs of the testator; it was held by the New York court of appeals that the entire devise was void, for the reason that it suspended the absolute

power of alienation beyond the continuance of two lives in being at the time when the devise was to take effect. The court thought that by this devise the widow and children of the testator and their surviving wives and husbands did not take successive legal estates, in which case the two first would be valid and the others void, but mere equities, all dependent upon the trust, which being void, the equitable interests all failed. In this case, notwithstanding a qualified power was given to the trustees to lease the estate for terms not exceeding ten years, and to sell such portions thereof as might be necessary to discharge liens and pay for improvements upon the residue, the absolute power of alienation was suspended, and hence it was void.

There is no subject which has created more intense litigation than that which arose on the construction of an instrument in which a remainder was limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises were given, wherein the question was whether the persons who, on the determination of the life estate should be the heirs of the body of such tenant for life, should be entitled to take as purchasers by virtue of the remainder so limited to them, or whether the whole estate should vest in the first taker; or in other words, whether the word heirs were words of limitation or words of purchase.

This question was settled in England in the reign of Elizabeth, by what is termed the rule in *Shelley's case*, and the rule itself is explained with more or less fullness by the English writers on estates. It is not intended in this work to go into an elaborate examination of that rule or of the reasons for it. Mr. Preston gives several descriptions of the rule, the most brief and comprehensive of which is, that where the ancestor takes an estate of freehold, by any gift or conveyance, and in the same gift or conveyance there is a limitation, either mediate or immediate, to his heirs, or heirs of his body, the word heirs is a word of limitation of the estate, and not of purchase. The consequence of this rule is, that the first taker takes the whole estate, in fee simple, according to the former law of this state. (*Shelley's case*, 1 *Rep.* 94, 104. 1 *Preston on Estates*, 264.) This rule was adopted by the supreme court of this state about the year 1801, as appears by the first reported case on the subject. (*Brant v. Gelston*, 2 *John. Cas.* 384.) The judges who delivered the opinion of the court assume that the doctrine of Shel-

ley's case was a part of the common law, and as such binding upon our courts. It continued to be the law of this state until the rule was abrogated by the legislature at the revision of the laws in 1830. The abrogation of the rule is thus expressed : " Whenever a remainder shall be limited to the heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the determination of the life estate, shall be the heir or heirs of the body of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder limited to them." (1 *R. S.* 725, § 28.) The abrogation of the rule applies to wills as well as deeds. Its effect is, in cases where the former rule applied, to turn estates in fee into contingent remainders ; and this probably, in most cases, was what the creator of the estate desired.

At common law, where an estate is conveyed or devised to A., and if he die without issue, or without heirs of his body, or without heirs when the limitation over is to an heir, then to B. in fee, A. takes an estate tail, on which the limitation to B. is valid as a remainder ; and if the entail be not barred, the fee will vest in B. or his heirs in case of the failure of the issue of A. at any distance of time. By the operation of our statute abolishing entails, the estate of A. is converted into a fee simple absolute, and thus the remainder to B. and his heirs is entirely defeated.

The revisers conceived that it was possible, notwithstanding the abolition of entailments, to preserve this remainder, and they did so by the provision declaring that when a remainder in fee should be limited upon any estate, which would be adjudged a fee tail, according to the law of this state as it existed previous to the 12th July, 1782, such remainder should be valid as a contingent limitation upon a fee, and should vest in possession on the death of the first taker, without issue living at the time of such death. (1 *R. S.* 722, § 4. 1 *R. L.* 52, § 1. *Van Rensselaer v. Poucher*, 5 *Denio*, 35. *Vanderheyden v. Crandall*, 2 *id.* 9.)

With respect to estates tail by implication, the foregoing provision was sufficient ; but it was deemed necessary to embrace limitations of chattel interests, and those cases in which the remainder was limited on the death of a person to whom no estate was given. (*Rev. Notes*, 3 *R. S.* 573, 2d ed.) This was sought to be accomplished by the 22d and 23d sections, (1 *R. S.* 724,) by enacting that when a remainder shall be limited to take effect on the death of any per-

son, without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" should be construed to mean heirs or issue living at the death of the person named as ancestor, and by declaring that all the provisions contained in that article relative to future estates should be construed to apply to limitations of chattels real as well as of freehold estates, so that the absolute ownership of a term of years should not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee. The effect of the former law upon the words "without leaving any issue," are explained in *Rathbone v. Dyckman*, (3 Paige, 30,) as meaning one thing when applied to personal estate, and an entirely different thing when applied to real property. The legislature intended to give to those words the natural and the same meaning, whether they were used with reference to real or personal property. (1 R. S. 724, §§ 22, 23; and 773, §§ 1, 2. *Norris v. Beye*, 3 Kern. 273.)

Subject to the rules established in the various sections in the article we are considering, and the most of which we have cited, a freehold estate, as well as a chattel real, may be created as well by deed as by will, to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee upon a contingency, which if it should occur must happen within the period prescribed in the same article. (1 R. S. 724, § 24.)

It was a principle of the common law, with respect to contingent remainders limited to a person not in being, that they must be limited to a person who by a common possibility, might be in esse at or before the determination of the particular estate. This rule was thus illustrated: if an estate be made to A. for life, remainder to the heirs of B.; now if A. dies before B. the remainder is at an end; for during B.'s life he has no heir, *nemo est hæres viventis*. But if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This was a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law. (2 Bl. Com. 170. Co. Litt. 378. *Crabbe's Law of Real Prop.* § 238.) But a remainder to the right heirs of B., if there be no such person as B. in esse, was void: for the reason that two contingencies must happen; first, that such a person as B. should be born, and secondly, that he should

die during the continuance of the particular estate; which made it *potentia remotissima*, a most improbable possibility. (2 *Bl. Com. supra. Cruise's Dig. tit. 16, ch. 2.*) On this principle it was held that a remainder to a corporation not in being at the time of the limitation was void although such be erected during the particular estate. (2 *Co. 51 b.*) So if a man giveth lands, says Coke, to two men and one woman, and the heirs of their three bodies begotten, in this case they have several inheritances; for albeit it may be said that the woman may by possibility marry both the men, one after another; yet *first*, she cannot marry them both *in presenti*; and the law will never intend a *possibility on a possibility*, as first to marry the one, and then to marry the other. (*Co. Litt. 184 a, 25 b. Cholmley's case, 2 Co. 51 b.*) This rule forbidding a remainder to be limited upon a remote contingency, or upon a possibility upon a possibility, or in the language of Mr. Fearn, rendering it void when it required the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, was abolished by the revised statutes in 1830. This applies not to remainders alone, but to all future estates. The language of the section is general, that no future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect. (1 *R. S. 724, § 26.*)

The common law allowed of estates depending on contingencies with a double aspect. Thus an estate might be given to A. for life, and if he have any issue living at the time of his death, then to such issue in fee; but if he die without issue, then to B. in fee. Here the remainders to the issue and to B. are both contingent, but one only can take effect. The moment one vests all the others are defeated. These are in truth alternate estates, as they are well denominated by the revisers. The estate is not rendered unalienable for a longer period than if a single limitation only had been created. They are expressly provided for by the 25th section, (1 *R. S. 724*,) thus: "Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it and take effect accordingly." This applies as well to estates created by grant as by devise.

At common law the event or contingency on which a remainder is limited must not have operated so as to *abridge, defeat or determine the particular estate*. This was supposed to be a necessary con-

sequence of the nature of a remainder, as defined by Coke ; it being of the essence of a remainder that it should only take effect in possession on the natural expiration or determination of the first estate. In fewer words, a remainder could not be limited on a condition subsequent. The reason of this rule was, that no one could take advantage of a condition but the party from whom it moved, namely, the grantor or his heirs : for if he or his heirs took advantage of a condition by entry or claim, the livery made upon the creation of the estate was defeated, and of course every estate thus created was thereby annulled and gone. By the terms of the definition, as a remainder must vest at the instant of the expiration of the preceding estate, and as a remainder was defeated by the entry of the grantor, therefore such remainder was void. It hence followed that a remainder, properly so called, could not be limited to take effect upon a condition, which was to defeat the particular estate ; whether such condition be repugnant to the nature of the estate to which it was annexed or not. (*Cruise's Dig. tit. 16, ch. 2, §§ 16, 17.*)

This rule, however, that a remainder limited on a condition subsequent was void, was not applicable to devises ; for in a devise, although strict words of condition are used, yet if there was a remainder over they were always construed as creating not a condition, but a conditional limitation, so that when the condition was broken, or performed, as the case might be, the remainder commenced in possession, and the person entitled under it had an immediate right to the estate, whether an heir or stranger. By thus doing, the intention of the testator was supposed to be effectuated by substantiating the subsequent estate, though limited to a stranger, and enforcing the performance of the condition by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself. Limitations of this kind were called *conditional limitations*. (*Cruise's Dig. § 33. Revisers' notes, 3 R. S. 574.*) The revisers admitted the soundness of these reasons, and therefore recommended that the same principle should apply to deeds as had formerly been confined only to wills. This was done (1 *id.* 725, § 27) by enacting that a remainder might be limited on a contingency which in case it should happen would operate to abridge or determine the precedent estate ; and that every such remainder should be construed as a *conditional* limitation, and should have the same effect as such a limitation would have at law. There is a manifest distinction between *conditions* and *limitations*.

The condition is for the benefit of the grantor and his heirs ; a limitation is conclusive of the time of the continuance, and of the extent of the estate granted. The first renders the estate voidable *by entry*, the second renders it void without entry.

It is remarked by Mr. Preston, that it depends on the intention whether words shall be construed as creating a condition precedent or condition subsequent. A contingent remainder is an interest to commence on a condition precedent ; it is a conditional limitation ; and an estate to be defeated by a condition, is a condition subsequent. (*Prest. on Est.* 41.)

It was a principle of the common law that no remainder could be limited on a condition, 1. Because such condition would operate so as to abridge the particular estate ; and 2. Because the entry of the donor, for the condition broken, would defeat the remainder.

It is required that where a remainder in an estate for life or years shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration by lapse of time of such term for years. (1 *R. S.* 725, § 29.)

Previous to the revised statutes of 1830, our statute relative to posthumous children applied only to them in the character of heirs. They were permitted to inherit as if born in the lifetime of their respective fathers. (1 *R. L.* 54, § 4.) It was according to the strict rules of the common law that a remainder to the first son of A. being a contingent remainder, must take effect during the particular estate of A., or *eo instanti* that it determined ; and that if A. had no son *in esse* at the time of his death the next remainder over took effect as if A. had died without issue. This led to the statute of 10 and 11 Wm. 3, ch. 16, by which posthumous children were allowed to take by virtue of deeds of settlement in the same manner as if born in the lifetime of their father. (*Stedfast v. Nichol*, 3 *John. Cas.* 26, 27.) Though this statute was re-enacted in the colony, it was repealed in 1788, and the case left to depend on the principles of the common law. The supreme court in *Stedfast v. Nichol*, (*supra*,) held that the posthumous child took an estate in remainder in the same manner as if he had been born in the lifetime of his father. The principle of that decision was carried into the revision, and it was expressly enacted that when a future estate, and this includes a remainder, shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take, in the same

manner as if living at the death of their parent. (1 R. S. 725, § 30.) On the same principle, a future estate depending on the contingency of the death of a person without heirs or issue, shall be defeated by the birth of a posthumous child of such person capable of taking by descent. (*Id.* § 31.) Thus, for these purposes, and there are other cases where the same rule applies, an infant *in ventre sa mere*, is considered as in actual existence.

It was a well settled principle of the common law that a remainder might be defeated by destroying or determining the particular estate upon which it depended before the happening of the contingency whereby it became vested. A different rule prevailed with regard to an executory devise. A limitation thus created by will received the full protection of law, and could not be prevented from taking effect by any means whatever. It was the policy of the legislature at the revision to put all expectant estates upon the same footing; and thus give the same stability to a contingent remainder, as to an executory devise or to a secondary use. It was a principle of the common law that a future interest capable of taking effect as a contingent remainder, should never take effect as an executory devise. (*Wolf v. Van Nostrand*, 2 Comst. 442.) By reducing all expectant estates to the same class, it was supposed that litigation would be diminished, and it would no longer become necessary to determine whether a particular disposition of property was a contingent remainder, an executory devise or a secondary use. (*See Revisers' Notes*, 3 R. S. 577, 2d ed.)

These objects were sought to be accomplished by declaring that no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger or otherwise. (1 R. S. 725, § 32.) It was supposed that this provision would render unnecessary the machinery by which the skillful conveyancer could preserve the contingent remainders from being defeated by the destruction of the particular estate, by any means, either accidental or designed. (*Vanderheyden v. Crandall*, 2 Denio, 16.) It in effect put all expectant estates upon the same footing. But it was necessary to provide that that section should not be construed to prevent an expectant estate from being defeated in any manner or by any means which the party creating the estate should, in the creation of it, have provided for or

authorized; nor should it be adjudged void in its creation because thus liable to be defeated. (*Id.* § 33.)

It has been before said that a remainder at common law was liable to be defeated by the determination of the precedent estate, before the happening of the contingency on which it was limited to take effect. This rule is abolished. But if the contingency afterwards happens, the remainder is allowed to take effect in the same manner and to the same extent as if the precedent estate had continued to the same period. (1 *R. S.* 725, § 34.) Formerly, if an estate were given to A. for life, with the remainder to the heirs of B., if A. died during the life of B. the remainder was destroyed. This was obviated by vesting the estate in trustees to preserve the contingent remainders. Under the rule established by the revised statutes, it will be unnecessary to create a trust, but the object of the party creating the estate is accomplished by direct means. Indeed such a trust cannot now be created.

The right of alienation is incident to the absolute ownership of estates in possession. It is on this principle that conditions in restraint of alienation are void as repugnant to the estate granted. (*De Peyster v. Michael*, 2 *Seld.* 497. 1 *Inst.* 223 *a.* *Co. Litt. Id.*) The same principle is applicable to expectant estates, embracing vested and contingent remainders as well as reversions. As they are the subject of ownership, so they should be of the various modes of transfer by which property is made to circulate. They are descendible, devisable and alienable, in the same manner as estates in possession. (1 *R. S.* 725, § 35.)

There was, at common law, a class of remainders hitherto unnoticed, namely, cross remainders. They were of a complex character and grounded upon a tenancy in common. They might be raised under deeds at common law, limitations of use, and limitations by devise. They could not arise without express limitations in deeds, for the reason that words of inheritance could not be implied in deeds. In wills and marriage articles they frequently arose by implication. The estate implied must always be an estate tail, and therefore if the words would not admit of the implication of that estate, cross remainders could not arise. (*Whart. Conv.* 115.) They seem not adapted to our system, in which that species of estate does not exist. They are not mentioned in our statute relative to the creation and division of estates, and the same statute enacts that all expectant estates, except such as are enumerated and defined in that

article, are abolished. (1 *R. S.* 726, § 42.) They probably form no part of our jurisprudence by that name.

Analogous to a contingent remainder, and supplementary to it, the law recognized a future estate by the name of an executory devise. This was defined to be strictly such a limitation of a future estate or interest in lands or chattels as the law admitted in the case of wills, though contrary to the rules of limitation in conveyances at common law. It differed from a remainder in three material particulars. 1. It did not need the support of a particular estate. 2. A fee simple or other less estate might be limited after a fee simple. 3. A remainder might be limited of a chattel interest after a particular estate for life created in the same. (2 *Black. Com.* 173.) We have already anticipated all that need be said upon this subject. We have seen that the revised statutes enable the party to create the same future estate by deed or grant, that could be before created only by will. In short, they have placed all the various kinds of future estates upon the same footing; thus placing, in a great measure, contingent remainders in the same category with executory devises. (*See post, part 3, ch. 9, § 6.*)

SECTION III.

Of Reversions.

The estates in expectancy hitherto considered in this chapter, are such as are created by the act of the parties. They owe their origin either to some form of conveyance *inter vivos*, or to a devise contained in a last will and testament. We come now to an estate which cannot be created by deed or other assurance, but arises from construction of law. From a collation of the definition of this estate in the elementary books, the revised statutes have adopted the following, as a brief and accurate description of the estate, viz: It is the residue of an estate, left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. (1 *R. S.* 743, § 12.) It is founded on the principle that when a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him; and the possession of it reverts or returns to him upon the determination of the preceding estate. In such a case the residue of the estate always continues in him who made the particular estate, or those who succeed to his rights. And

Coke says the law termeth a reversion to be expectant upon the particular estate; because the donor or lessor, or their heirs, after every determination of any particular estate doth expect or look for, to enjoy the lands or tenements again. (*Co. Litt.* 183 b. *Payn v. Beal*, 4 *Denio*, 411.)

A person is said to be *entitled* to, not *seised* of an estate in reversion. Yet an estate in reversion is a vested interest. The party entitled to it has a fixed right of future enjoyment. It is vested *in presenti*, though to take effect in possession and enjoyment *in futuro*. It may be aliened or changed. (*Cruise's Dig. tit.* 17, § 13.) Like all other expectant estates, it is descendible, devisable and alienable, in the same manner as estates in possession. (1 *R. S.* 725, § 35.) The conveyance of a reversion did not require livery of seisin. It would pass by a grant; though it is said that in England the most usual mode of conveyance of an estate in reversion is by lease and release, and bargain and sale. (2 *Preston on Abstracts*, 85.) Both these modes of conveyance are valid in this state, being deemed grants; which latter is the mode of conveyance adopted by the revised statutes for the assurance of the titles of estates in fee and freehold interests. (1 *R. S.* 738, § 157; *Id.* 739, § 162.)

An estate in reversion may lose its denomination and qualities by becoming an estate in possession; which may be accomplished by the surrender, merger, forfeiture or actual determination of the prior estate. (2 *Preston on Abst.* 84.) The surrender of an estate for years will not extinguish the rent previously due, whatever effect it may have upon the remedy to collect what had previously accrued. While rent was distrainable, it was held that a surrender of the demised premises after a distress made for rent due, would not render the distress unlawful. (*Nichols v. Bailey*, 2 *Comst.* 283.)

The usual incidents to an estate of reversion are said to be *fealty* and *rent*. In this state fealty no longer exists, and rent when it has been reserved out of the particular estate is so far an incident of the reversion, whether absolutely or by way of mortgage, as entitles the grantee to the rents which subsequently accrue. (*Demarest v. Willard*, 8 *Cowen*, 206. *Burden v. Thayer*, 3 *Metc.* 76.)

Although the rent is incident to the reversion, it is not *inseparably* incident. A grant of the reversion excepting the rent will pass the reversion alone, and leave to the grantor the rent. So the rent may be assigned without the reversion. (*Demarest v. Willard*, *supra*. *Co. Litt.* 143 a.) But the assignment or grant of the rever-

sion without qualifying words, will carry with it the rent also. (*Id. Co. Litt.* 151.)

An estate in reversion expectant on a *freehold*, is neither subject to dower or curtesy; but it is said by Lord Coke that a reversion expectant in an estate for years is subject to both. (*Co. Litt.* 29 a, 32 a. *Cruise's Dig. tit.* 5, § 23; *tit.* 6, § 8.) The seisin of the reversioner is not so affected by an estate for years as to prevent the existence of curtesy or dower.

A reversioner has such an interest in the estate that he can maintain an action for an injury to the inheritance. By statute the person seised of an estate in remainder or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. (1 *R. S.* 750, § 8.) A reversioner or remainderman may also be admitted to defend as a party to suits against the tenant of the particular estate. (2 *id.* 339, §§ 1, 2.) And no recovery unduly had against the tenant of the particular estate can bar the right of the reversioner or remainderman to restitution. (*Id.* 340, §§ 6, 7.)

CHAPTER VII.

OF ESTATES WITH RESPECT TO A SEVERAL AND JOINT OWNERSHIP.

An estate which is owned by a single individual, whether male or female, and whether a natural person or a corporation, is said to be held in severalty. This applies to estates of any quantity of interest or length of duration, and whether the estate be in possession or expectancy. This is the usual way of holding real property; and, therefore, the general rules with respect to estates, when nothing appears to the contrary, is supposed to have reference to estates in severalty. But it often happens that the title to real property is vested either by descent or purchase in more individuals than one; and this gives rise to the doctrine of joint estates. At common law there were three kinds of joint estates, namely, coparcenary, joint tenancy and tenancy in common.

SECTION I.

Of Estates in Coparcenary.

The estate in coparcenary arose, at common law, when lands descended to two or more persons, as when a person seised in fee simple died and his next heirs were two or more females, his daughters, sisters, aunts, cousins, or their representatives. In England, by special custom, as in gavelkind, the same estate was created by a descent to all the males in equal degree, as sons, brothers, uncles, &c. In both these cases, all the parceners put together made but one heir, and had but one estate among them. (2 *Black. Com.* 187.)

This species of estate arose only by descent. They were called parceners, because they could be compelled to make partition. Though they had a unity of interest, they had not an *entirety* of interest. They were each entitled to the whole of his or her share, and there were several inheritances on the death of either. There was no survivorship, or *jus accrescendi* as in joint tenancy. The estate was liable to curtesy and dower. (*Litt.* §§ 263, 264.)

There is much curious learning in the old books as to this estate; but it is of no value in this state, since our statute has long ago provided that wherever an inheritance shall descend to several persons, they shall take, as tenants in common, in proportion to their respective rights. (1 *R. S.* 753, § 17. *Laws of 1786*, 1 *Greenlf.* 205, 206.) And this is applicable alike to both sexes. This kind of estate has not been created since the year 1786, and it probably does not exist in any of the states at this day.

SECTION II.

Of Estates in Joint Tenancy.

The estate in joint tenancy is invariably created by purchase, and does not arise by descent. It occurred, at common law, when lands or tenements were granted or devised to two or more persons, to hold in fee simple, fee tail, for life, for years, or at will. (*Litt.* § 277.)

Before proceeding to notice the incidents of this estate it is proper to remark that by the law of this state, originally passed in 1786 and revised in 1830, every estate granted or devised to two or more persons in their own right is a tenancy in common, unless expressly declared

to be in joint tenancy; but every estate vested in executors or trustees as such, is required to be held by them in joint tenancy. (1 *R. S.* 727, § 44.) This section of the law applies as well to estates already created or vested, as to estates thereafter to be granted or devised. The estate in joint tenancy is rarely created in this state, except in devises or grants to persons in a fiduciary capacity; as to executors or trustees. The incidents of the estate hereafter noticed have reference to the estate when legally created. At common law a devise or grant to two or more, in fee, or for life, without further words, made them joint tenants. If the grantor desired only to create a tenancy in common, he must so express it in the grant or devise. Our statute, it will be perceived, has reversed the common law rule, and made the estate a tenancy in common, unless the instrument creating the estate *expressly* declares otherwise, except in the case of executors and trustees.

With respect to the properties and incidents of an estate in joint tenancy, it is to be observed that they are derived from its unity, which is fourfold, namely: unity of interest, unity of title, unity of time, and unity of possession. (2 *Black. Com.* 180. *Crabbe's Law of Real Property*, § 2033.) Therefore, joint tenants have one and the same interest, accruing by the same conveyance, commencing at the same time, and held by one and the same undivided possession. (*Id.*)

1. The *quantity* of interest of each joint tenant must be the same. One cannot be tenant for years and the other for life; one cannot be seised of a freehold in possession and the other of a reversion upon a freehold. (*Co. Litt.* 188.)

2. Joint tenants must have a unity of title. It must be created by the same act. One cannot derive his title by descent and the other by devise. One cannot derive his title by grant from A. and the other by grant from B. For one title might prove good and the other bad.

3. There must be a unity of time. Each estate must be vested at the same time as well as by the same title. The case put by Coke to illustrate this is, if lands be demised for life, the remainder to the right heirs of J. S. and of J. N.; J. S. has issue and dies, and J. N. has issue and dies. The issue in this case are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time. (*Co. Litt.* 188.)

4. And lastly, there must be unity of *possession*. Joint tenants

are said to be seised *per my et per tout*, by the half or moiety, and by all : that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety ; neither can one be exclusively seised of one acre and his companion of another ; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. (2 *Bl. Com.* 182.)

The principal incident of an estate in joint tenancy is the *jus accrescendi*, or right of survivorship. Upon the death of one joint tenant, whether the estate was in fee, for a term of years, or in trust, his interest passed not to his heirs or other representatives, but to the surviving co-tenant or co-tenants. Hence a joint tenant could not devise his interest, because, as a will takes effect only at the death of the testator, the estate would pass to the survivor, and thus overreach the will.

The English common law, before the abolition of tenures, favored title by joint tenancy, because it prevented a severance of estates. But since that time, the reason having ceased, the courts have leaned against that estate. In *Rigden v. Vallier*, (3 *Atk.* 731,) Lord Hardwicke held that the words “to hold to them and their heirs equally to be divided betwixt them,” created a tenancy in common, whether the instrument of conveyance be a deed or a will.

In the same case the same learned chancellor held that courts of equity took great latitude upon the foot of intention, and therefore if two persons advance money upon a mortgage, though the conveyance be made to them jointly, it shall be a tenancy in common.

Partners are joint tenants of all the partnership property during their lives, and on the death of one the remedy to recover debts due to the firm survives to the survivor or survivors. Littleton says that if an obligation be made to many for one debt, he which survives shall have the whole debt or duty. And so it is of other covenants and contracts, &c. (*Litt.* § 282.) Lord Coke, in his commentary upon this, says, an exception is to be made of two joint merchants, with respect to whom, by the law merchant, there is no survivorship, but the share of the deceased shall not survive, but go to his executors or administrators. This, he says, is for the advancement of trade and commerce, which is for the public good ; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. This rule is applicable to all traders, and has been extended to partners in the practice of physic, (*Allen v. Blanchard*, 9

Cowen, 631,) and by parity of reason, it applies to all partnerships. The action survives but the interest does not. (*Collyer on Partnership*, 65.)

The statute already referred to, (1 R. S. 727, § 44,) declaring that a grant or devise to two or more persons in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy, is not applicable to an estate granted or devised to husband and wife. They take by *entireties*. They have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage, they have the estate entirely as one individual, and on the death of one of them, the entire tenements will belong to the survivor, without the power of alienation or forfeiture of either alone, to the prejudice of the other. (1 *Prest. on Estates*, 131. *Jackson v. Stevens*, 16 John. 110. *Shaw v. Hearsay*, 5 Mass. R. 521. *Per Lord Kenyon, in Doe v. Parrott*, 5 D. & E. 654.)

It is said by Littleton, (§ 291,) that if a joint estate be made of land to a husband and wife and to a third person, the husband and wife have in law in their right but the moiety, and the other person the other moiety. The reason assigned for it is, that the husband and wife are but one person in law, and are in the like case as if an estate be made to two joint tenants, when one has by force of the jointure the one moiety in law, and the other the other moiety. The same rule applies to a larger number of grantees. The husband and wife take but one share, and are treated but as one person. (*Id.* 1 *Prest. on Estates*, 132.) And suppose the other joint owners all die leaving the husband and wife survivors, the whole then becomes their property, and the husband and wife are tenants by entireties.

But though husband and wife are, for certain purposes, treated as one person, they are nevertheless distinct individual persons. If a grant of land be made to them, *as tenants in common*, without regard to their social union, they will hold by moieties, as other distinct and individual persons would do. (1 *Preston on Estates*, 132. 2 *Preston on Abstracts*, 41.)

There are several modes by which an estate in joint tenancy may be destroyed. A destruction of the unity of title, the unity of interest, or the unity of possession, will work out this consequence. If one joint tenant release to his companion, the latter becomes seised in severalty. So if all the joint tenants unite in a conveyance to an individual, the same result follows. If joint tenants unite in a

conveyance to second persons, the latter are tenants in common unless the instrument of conveyance expressly mentions, that an estate in joint tenancy is intended to be created. So if there be three joint tenants and one releases to one of his companions all his right which he has in the land, the releasee, with respect to the land released, will be tenant in common with the other two, and the latter two joint tenants of the remainder. (*Littleton*, § 304.) For the purpose of tenure and survivorship, joint tenants have the whole estate, while for the purpose of immediate alienation each has only a particular part.

At common law one joint tenant could not compel his companion to make partition. By the statute of 31-32 of Henry 8, the writ of partition was given, the first for estates of inheritance, and the last for estates for life or years. These were re-enacted in this state in 1788, and revised in 1830, (2 *R. S.* 315,) by which one or more joint tenants or tenants in common, whether the estate be one of inheritance, or for life or years, may compel partition to be made; and this whether the parties be infants, or of full age, or whether they or any of them labor under the disability of coverture. The statute contains numerous provisions on the subject which are adopted by the code of procedure, (§ 448.) Under the revised statutes it has been held that proceedings in partition can only be by a party having an estate entitling him to an immediate possession, though an actual *pedis possessio* is not indispensable. (*Brownell v. Brownell*, 19 *Wend.* 367.) The remedy under the statute is not confined to actions at law, but may be prosecuted in a court of equity, which has been since the reign of Elizabeth the tribunal most frequently resorted to. (*Cruise's Dig. tit. 18, ch. 2, § 38.*) Courts of equity, it has been held, have a general concurrent jurisdiction with courts of law in all cases, as well by statute as at common law. (*Smith v. Smith*, 10 *Paige*, 470. *Haywood v. Judson*, 4 *Barb.* 228.)

The revised statutes make suitable provision for the case of unknown owners, (2 *R. S.* 319, § 12,) and respecting the estate of tenants in dower or by the curtesy. (*Laws of 1847, ch. 430, § 5. 3 R. S.* 609, 5th ed.)

The provisions in relation to partition are not applicable to the joint estate of husband and wife, who hold by *entireties*, nor to estates held by trustees.

Husband and wife cannot, at common law, convey to each other. But they can unite in a deed to a third person of land held by the

husband in right of his wife, or held by them jointly; and on a reconveyance, by the grantee, to the husband or the wife, the latter grantee will hold in severalty. (*Jackson v. Stevens*, 16 *John*. 110.) The deed of the wife, in these cases, to be available, must be acknowledged before a proper officer. (*Id.* *Jackson v. Cairns*, 20 *John*. 301. *Doe v. Howland*, 7 *Cowen*, 277. *Gillet v. Stanley*, 1 *Hill*, 121, 125.)

The act concerning the rights and liabilities of husband and wife, passed on the 20th March, 1860, (*Laws of 1860*, *ch.* 90,) does not seem to affect estates conveyed to husband and wife jointly; but leaves unaltered the common law in this respect, whatever effect it may have on the estate of curtesy or dower.

Trustees who take an estate either of real or personal property in trust, hold by virtue of the statute in joint tenancy. They cannot denude themselves of that character by any arrangement between themselves, nor do they fall within the statute of partition. If, in execution of their trust, it becomes necessary to alien the estate, in whole or in part, they must all unite in the conveyance, and their grantee, in good faith, takes the estate discharged of the trust; and their grantees, if there be more than one, take as tenants in common, unless it be otherwise expressed in the deed. (*Ridgley v. Johnson*, 11 *Barb.* 527.)

Executors and administrators hold the property of the testator or intestate, cast upon them by law, as joint tenants; but they cannot, by their own act, make partition among themselves. Their authority over the trust fund is, in general, regulated by the testamentary law; and their power over it subject in a great degree to the control of the proper surrogate's court. (2 *R. S.* 220.)

SECTION III.

Of estates in common.

The usual title by which a joint ownership of estates is held in this state is by tenancy in common; and it is invariably so, whether the title be by grant or devise, unless declared to be in joint tenancy, or it be vested in executors or trustees as such. (1 *R. S.* 727, § 44.) This estate arises where two or more persons hold lands or tenements in fee simple, or for term of life or years, by several titles, and occupy the same lands or tenements in common. Since the statute, it may as well arise under a joint title, as a several title. The only

unity required between the tenants is that of possession. (*Littleton*, § 292.)

This estate may be created by the destruction of an estate in joint tenancy, as well as by an express limitation in a deed, or by a grant or devise to several without expressing that the grant or devise is in joint tenancy.

There is no survivorship among tenants in common, and therefore, on the death of one, his interest, if it be an inheritable interest, goes to his heirs, who thus become tenants in common among each other with respect to that share, and tenants in common with the survivors with respect to the whole estate; their interest being limited to that of their ancestor.

Tenants in common may have several distinct estates, either of the same or of a different quantity, in any subject of property, real or personal, in equal or unequal shares, and either by the same act or by several acts. The estate differs from that of joint tenancy, in this among other respects. Joint tenants have one estate in the whole, and no estate in any particular part; they have the power of alienation over their respective aliquot parts, and by exercising that power, may give a separate and distinct right to their particular parts. Tenants in common have several and distinct estates in their respective parts. Each tenant in common has, in contemplation of law, a distinct tenement, a distinct freehold, &c. (1 *Preston on Estates*, 139.) Unity of tenure in the different portions of the land is not, nor is unity of estate necessary to a tenancy in common. Unity of right of possession merely is all that is required. (*Per Walworth, Ch. in Putnam v. Ritchie*, 6 *Paige*, 398.)

The widow, with respect to her dower, before assignment, is not a tenant in common with the heir. Her right rests in action only. (*Jackson v. O'Donaghy*, 7 *John*. 249, *per Van Ness, J.*) After the assignment of her dower, she holds it in severalty by operation of the statute.

One tenant in common cannot, as against the rights of his associates, convey a distinct portion of the estate by metes and bounds; nor can a judgment creditor of one tenant in common, sell by execution a distinct portion of the estate discharged of the right of the other tenants in common. (*Bartless v. Harlow*, 12 *Mass. R.* 348. *Porter v. Hill*, 9 *id.* 34.)

Although partners hold their partnership stock in joint tenancy, so far, at least, as the remedy is concerned, it is otherwise with re-

gard to real estate. Such estate, though held for the purposes of the partnership, is in general held not as partners but as tenants in common, and the rules relative to partnership property do not apply to it. Hence one partner can only sell his individual interest, and when both join in the sale and conveyance, and one only receives the purchase money, the other may maintain an action against him for his proportion. (*Coles v. Coles*, 15 *John*. 159. *Balmain v. Shore*, 9 *Ves*. 500, 508.)

A deed of conveyance by one tenant in common to a stranger, of his entire interest in the land, though drawn as though he owned the whole, will be effectual to convey his undivided interest, and works no injury to his companion.

One tenant in common cannot sue his co-tenant to recover documents relative to their joint estate. (*Cowes v. Hawley*, 12 *John*. 484.) Nor can he recover for repairs, from his co-tenant, without a previous request and refusal of the co-tenant to join in making them. (*Mumford v. Brower*, 6 *Cowen*, 475.) Nor is he affected by a location of the land by his co-tenant unless he acquiesces, and acquiescence will not be presumed from mere lapse of time. (*Jackson v. Moore*, 6 *Cowen*, 706.) This principle does not seem to be affected by the subsequent reversal of the above case. (4 *Wend*. 58.)

With respect to the acts which one tenant in common may do, and bind his co-tenant, it has been held, that before distress and avowry, he may receive the whole rent, and discharge the lessee. (*Decker v. Livingston*, 15 *John*. 479.) When the lands of tenants in common were taken by the state and appropriated for the canal, and the appraised damages were paid to one, it was held that he was liable to account to the others for their proportion. (*Brinkerhoff v. Wemple*, 1 *Wend*. 470.)

A tenant in common in possession accounting with his co-tenants is chargeable only with the net rents and profits, after deducting for necessary repairs, and taxes, and assessments. (*Hanna v. Osborn*, 4 *Paige*, 336.)

There may be a tenancy in common of chattel interests. A letting of land upon shares makes the parties tenants in common of the crops raised under the agreement. (*Demott v. Hagaman*, 8 *Cowen*, 220. *Caswell v. Districh*, 15 *Wend*. 379. *Putnam v. Wise*, 1 *Hill*, 234.) But a person who raises a crop of corn on the land of another, on an agreement to give the owner a certain number of bushels of corn by way of rent, is not a tenant in common of the crop with the

owner of the land. He owns the crop in severalty, and the owner of the land is entitled only to his rent, the amount of which is ascertained by the value of the corn. (*Newcomb v. Agan*, 2 *John*. 421, *n.*) The owner of the land has no lien upon the specific corn, for the rent may be paid in any corn. (*Id.*)

One tenant in common of a chattel cannot maintain trespass or trover against the other, unless the thing held in common be destroyed. (*Selden v. Hickock*, 2 *Cain*. 166. *St. John v. Standring*, 2 *John*. 468. *Wilson v. Reed*, 3 *id.* 175. *Mersereau v. Norton*, 15 *id.* 179.) But he may recover, in a proper action, half of the money received by the other owner in common on the sale of the property. (*Id.* *Cochran v. Carrington*, 25 *Wend.* 409.)

The mere sale by one tenant in common, of the entire chattel, is in itself a conversion, and entitles his co-tenant to an action. (*White v. Osborn*, 21 *Wend.* 72.) When several persons voluntarily mingle their wheat in a common bin, they become tenants in common, and the sale of the entire mass by one of them, subjects him to an action. (*Nowlen v. Colt*, 6 *Hill*, 461.)

Though the sale of the whole chattel by one tenant in common, without the consent of his co-tenant, is a conversion, yet one tenant in common may sell the whole chattel, for the benefit of all, and they may ratify his act by joining in an action for the price. (*Putnam v. Wise*, 1 *Hill*, 234.) The subsequent ratification is equivalent to an original authority; and the sale by one thus becomes the sale by all.

Many of the incidents of an estate in joint tenancy are applicable to a tenancy in common. They can make partition by their voluntary act, each conveying to the other by a deed of grant or release, the proportion to which he is entitled. They will thus own their respective shares in severalty.

But if any one is unwilling voluntarily to sever his interest from that of the others, he can be compelled, as matter of right, to make partition, by the common law, as well as by the statute referred to in the preceding section. (*Smith v. Smith*, 10 *Paige*, 470. 3 *R. S.* 602, 5th ed. *Code of Procedure*, § 448.)

There are cases in which a partition of the lands and tenements, held in common, cannot be made by metes and bounds, without great prejudice to the owners. In such a case the court may order a sale of the premises, at public auction, to the highest bidder, and pay the proceeds, after deducting the costs and charges, to the respective

parties, according to their respective interest in the fund. (3 *R. S.* 611, § 46-54, 5th ed.) This course may be adopted with respect to any distinct lot, tract or portion of the premises of which partition is sought. The sale may be for cash, or upon a credit for portions of the purchase money, and upon such security as the court may direct. (*Id.*)

Where the real estate, of which partition was sought, consisted of a mill dam, and the lands overflowed by the mill pond, constituting the water power, which was necessary for the use of various mills which belonged, in severalty, to the respective tenants in common of such dam and pond, it has been held that an actual partition of the water power should be made, instead of a sale thereof, if the whole water power in connection with the mill property, held in severalty by either party, would not be worth more than the same water power equally divided by a proper partition thereof, the one half to be used by the mills of each, in the hands of different proprietors. (*Smith v. Smith*, 10 *Paige*, 470.) In the same case it was held that the commissioners assigned to make partition might divide the mill dam, and the lands under the same and under the waters of the pond, and might make such provision for keeping the different portions of the dam and of the water gates and flumes in repair, and such regulations for the use of the water power, which was not capable of actual partition without a destruction of its value, as the parties themselves might make, by a partition deed of the same property. And the Chancellor thought, that in making partition of real property, the commissioners might assign a portion of the premises held in common, to one of the parties, charged with a servitude, or easement for the benefit of another party, to whom a distinct portion of the premises was assigned in severalty. (*Id.*)

Where any of the defendants in partition are absentees, or infants, or unknown, the court, before making the decree, will see that all proper persons are before it, so as to make the decree effectual. (*Braker v. Devereaux*, 8 *Paige*, 513.) In like manner, proper measures should be adopted by the court, to ascertain general liens or encumbrances on the undivided shares or interests of the parties, before making a decree of sale. (2 *R. S.* 418, § 43. *Wilde v. Jenkins*, 4 *Paige*, 48.)

It is not indispensable that all the shares should exactly correspond in value; but one party may be decreed to make compensation to another for equality of partition. (*Smith v. Smith*, *supra*. *Lar-*

kin v. Mann, 2 *Paige*, 27.) Equity, it has been held, may direct a partition for the purpose of setting off one of the co-tenant's shares, and decree a sale of the residue for the benefit of the other tenants, providing for compensation in case of inequality of partition. (*Haywood v. Judson*, 4 *Barb.* 228.)

Courts of equity exercise a beneficent authority with respect to improvements erected by one in good faith on the common property. Where a tenant in common, believing himself entitled to the whole premises, erected valuable buildings, an equitable partition was directed that should give him the benefit of them. (*Town v. Needham*, 3 *Paige*, 545.)

On the same principle it was held in *Green v. Putnam*, (1 *Barb.* 500,) that where one tenant in common makes improvements on the land, a court of equity in making partition will decree an account and compensation, or else assign to him the part of the premises on which the improvements have been made; and it is not necessary to show the assent of the co-tenants, nor a request and refusal to join in the improvements. It is obvious, however, that in such a case, the improvements should have been made in good faith. A court of equity administers its relief *ex equo et bono*, according to its own notions of general justice and equity between the parties. It will adjust by its decrees, all the equitable rights of the parties interested in the premises. It is not restrained as a court of law is, to a mere partition of the lands between the parties, according to their interests in the same, and having a regard to the true value thereof. (*Per Paige*, in *Green v. Putnam*, *supra*.)

Though the statute of limitations is applicable to an action at law by one tenant in common against his co-tenant for repairs; or to an action of account or bill in equity between tenants in common, when one tenant in common has received more than his just proportion of the profits, it is not applicable to the equitable rights of a tenant in common to an allowance for improvements made by him, on a partition of the premises in equity. (*Per Paige*, *J. supra*.) And as law and equity are now administered by the same tribunal and in the same action, it would seem that these principles have a general application.

At common law one tenant in common or joint tenant could not even compel his co-tenant to account to him for taking more than his share of the profits, unless he could show he had made him his bailiff or receiver. (*Co. Litt.* 200 b.) This defect of the common

law has been remedied by statute. An action of account at law can now be maintained, where one tenant in common or joint tenant *has received* more than his just proportion of the profits. (*Green v. Putnam, supra*. 1 R. S. 750, § 9.) But the statute does not apply to a case where one tenant in common *occupies himself* the entire premises, without any agreement with the others as to his possession, or any demand on their part to be allowed to enjoy the premises with him. (*Wodever v. Knapp*, 18 Barb. 265. *Henderson v. Eason*, 9 Eng. L. and E. 337. *McMahon and wife v. Burckell*, 2 Phil. R. 127. 22 Eng. Ch. Rep. 125.) The remedy in such a case is for the co-tenant, if he has been dispossessed, to resort to an appropriate action; and if not *forcibly* expelled, he should demand to be admitted into the enjoyment of his share of the premises, and on being refused he should resort to an action for such refusal. (*Erwin v. Olmstead*, 7 Cowen, 229.)

One of the evils inseparable from a joint ownership of an estate, is that the individuals will be apt to feel less interest and solicitude for its preservation, than if each owned the same property in severalty. The common law was extremely deficient in this respect. It favored, indeed, the maintenance of houses for the habitation of mankind, *pro bono publico*. And therefore, if there be two tenants in common or joint tenants of a house or mill which has fallen to decay, and the one was willing to repair the same and the other not, the common law gave the writ *de reparatione facienda*, the language of which was, *ad reparationem sustentationem ejusdem domus tenantur*. (*Co. Lit.* 54 b; *Id.* 200.) But the writ did not extend to other improvements which might be greatly for the benefit of the estate, such as repairing or renewing the fences, erecting buildings where none before existed, clearing up wild land and preparing it for agricultural purposes, and the like.

In *Mumford v. Brown*, (6 Cowen, 475,) it was settled in this state, that even for a necessary repair to the land, without the previous request to join in the repairs made, and a refusal so to do, no action could be sustained. The chief justice (Savage) thought that till request to join in the repairs, and a refusal, both tenants were in equal fault, one having as much reason to complain as the other.

The duty of contribution, where expenses have been necessarily incurred and paid by one tenant in common, for the benefit of the common property, results from the plainest principles of equity. No one should enjoy a benefit without sharing in the burden by

which it is obtained. There is, indeed, some danger in permitting one tenant in common to make improvements without request and without notice. He may thus incur expenses disproportionate to the value of the property. And the character of the improvements may be a just matter of dispute between the parties. A partition, or sale of the property under a decree of the court, is the last and final remedy.

CHAPTER VIII.

OF INCORPOREAL HEREDITAMENTS.

In the second chapter of this treatise we observed that the most comprehensive definition of real property, was into lands, tenements and hereditaments. After defining lands and tenements, we remarked that *hereditaments* is a term of larger import than *lands or tenements*, as it comprehended whatsoever could be inherited, whether corporeal or incorporeal, real, personal or mixed. We then divided real property into corporeal and incorporeal hereditaments. (*Laymen v. Abiel*, 16 *John*. 32.) We have, in the preceding chapters, treated of corporeal hereditaments, in various aspects, and it is now proposed, in this chapter, to treat of incorporeal hereditaments.

An incorporeal hereditament is defined to be a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exercisable within the same. (2 *Bl. Com.* 20.)

This species of property embraces a larger number of particulars, in England, than in this country. The institutions of the former create some rights and duties which are inapplicable to our circumstances and condition.

The English books of authority generally divide incorporeal hereditaments into ten sorts, viz: advowsons, tithes, corodies, offices, dignities, commons, ways, franchises, annuities and rents. The three first owe their origin and importance to their church establishment; the next two, viz: offices and dignities, are mainly concerning their nobility; and none of them have any but an historical interest to an American lawyer. It is not proposed to discuss them in the present work. The remaining five, viz: commons, ways, franchises, annuities and rents, exist in this country, and are governed by the principles of the common law, as modified by our statutes. It is

proposed to treat of them very briefly in this chapter, under separate sections. We shall also add some observations on the right to air and light, and to some other easements which properly belong to this branch of the law.

SECTION I.

Of Commons.

Common imports a right or privilege to take a profit in common with many. It is of three kinds : *appendant*, *appurtenant*, and in *gross*.

Common *appendant* is a right annexed to the owner or possessor of land to feed his beasts, or take wood, &c. (2 *Black. Com.* 38. 1 *Crabbe on Real Property*, 268.) Common *appurtenant* does not arise from any connection of tenure, but must be claimed by grant or prescription. Common *in gross* is a right not annexed to the land, but to the person, and must be claimed by grant or prescription. (*Id. Cruise's Dig. tit. 23, § 19.*)

The subject has been occasionally discussed in the courts of this state. It was explained by Savage, chief justice, in delivering the opinion of the court in *Van Rensselaer v. Radcliff*, (10 *Wend.* 647.) He thus speaks of this branch of the law : "Common or a right of common, is a right or privilege which several persons have to the produce of the lands, or waters of another. Thus, *common of pasture* is a right of feeding the beasts of one person on the lands of another ; *common of estovers* is the right a tenant has of taking necessary wood and timber, from the woods of the lord, for fuel, fencing, &c. ; *common of turbary* and *piscary* are, in like manner, rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are, in general, either *appendant* or *appurtenant* to houses and lands. There is much learning in the books relative to the creation, apportionment, suspension and extinguishment of these rights, which, fortunately, in this country, we have but little occasion to explain ; but few manors exist among us as remnants of aristocracy not yet entirely eradicated. These common rights which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country

such rights are uncongenial to the genius of our government, and the spirit of independence which animates our cultivators of the soil. In our state, however, we have the manors of Livingston and of Rensselaerwyck, and some others, in which these rights have existed, and to some extent do exist, and we are obliged to look into the doctrine of commons to ascertain the rights of parties and do justice between them."

Cases growing out of rights to common are less frequent now than at the time the chief justice delivered the foregoing remarks.

Common of *pasture* is the principal of these rights, and therefore most of the cases in the books relate to that species of common. This species of common is apportionable. (*Id.*)

Common of *estovers* cannot be apportioned; and if a person entitled to common, convey his land to which it is appurtenant, part to one person and part to another, the right is extinguished. (*Id. Livingston v. Ketchum*, 1 Barb. 592.) The principle which runs through the cases is, that the land which gives a right of common to the owner, shall not be so alienated as to increase the charge or burden of the land out of which common is to be taken, and that when the right is extinguished or gone, as to a portion of the land entitled to common, it is extinct as to the whole; for in such a case, common appurtenant cannot be extinct in part, and be *in esse* for part, by the act of the parties. (*Per Spencer, Ch. J. in Livingston v. Tenbroek*, 16 John. 26.)

The grantee of a right of common in gross, and without number, may alien it, and if he fails to do so, it descends to his heirs; but he cannot alien it in such a way as to give the entire right to several persons, to be enjoyed by each separately. Where it descends to several persons as tenants in common, it cannot be divided between them, but it must be enjoyed jointly. One of the tenants alone cannot convey it to a stranger, though all, by joining in the conveyance, may convey the right, (*Layman v. Abeel*, 16 John. 30.)

There is a right somewhat analogous to common appendant, claimed by the inhabitants in the rural districts, of permitting their cattle, horses or sheep to go at large on the highways, at certain seasons of the year.

Prior to 1830 the courts pretty uniformly held that the public had simply a right of passage over the highway, and no right to depasture it. The owner of the land was treated then as he is now, as

the owner of the soil, the timber and the grass; and it was hence inferred that the towns had no right to make any regulation for the pasturing of the highway by domestic animals. (*Hallady v. March*, 3 *Wend.* 147. *Jackson v. Hathaway*, 15 *John.* 453. *Gedney v. Earle*, 12 *Wend.* 98. *Tonawanda Rail Road Co. v. Munger*, 5 *Denio*, 264.) In some of the cases the right of the towns to make regulations was denied on the ground that the public paid the owner, on laying out a road, only for the easement of a way—a mere right of passage. If we assume that to be the law, it would seem to follow, from principle, that the public should not be permitted to enjoy that for which they had made no compensation.

This question was examined by the supreme court in the fourth district in 1849, in *Griffin v. Martin*, (7 *Barb.* 297,) and the majority held that the act which authorized town meetings to determine the times and manner in which cattle, horses, or sheep shall be permitted to go at large on highways, was not in conflict with the constitution, which forbids the taking of private property for public use without just compensation. The court thought the act relative to towns, and that relative to highways, should be construed together as if part of one system; and, therefore, at least since 1830, when the soil is taken for a highway, the compensation that is made for it is not only for the right of passage, but also for the right of pasturage for cattle, horses and sheep, at such times and in such manner, as the electors of each town, at their annual town meeting, may prescribe. Compare act relative to highways (1 *R. S.* 513, §§ 54 to 101, with the act relative to town meetings, &c. 1 *R. S.* 340, § 5, sub. 11.) This view of the subject was not suggested to the learned judge who delivered the opinion in *White v. Scott*, (4 *Barb.* 56,) nor was it material for him to decide the question. His observations on the power of the towns, though entitled to high respect, are not of controlling authority. But the case of *Griffin v. Martin* was approved by the supreme court in the third district, in *Hardenburgh v. Lockwood*, (25 *Barb.* 9–12.) Indeed, the learned judge who delivered the opinion in the last case, went further than the court in *Griffin v. Martin*. He held, upon sound reasoning, that the right to allow cattle, horses and sheep to go at large on highways, is one of the easements or servitudes pertaining to the land occupied as a highway. The right, he observes, is supported by usage as old as the history of our country. The owner may well be presumed to have been compensated for this as well as for every

other easement or servitude to which the land, as a highway, is subjected. It was shown, in *Griffin v. Martin*, that since 1830 there is in *fact* a compensation paid for both easements.

This species of common is more like *common because of vicinage*, than any other. This latter is said to be where two townships which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields without any molestation from the other. It is called a *permissive right*, intended as an excuse from what is, in strictness, a trespass in both. (*Cruise's Dig. title 23, § 15.*)

There are various ways by which a right of common may be extinguished. 1. It may be done by a release of it to the owner of the land; 2. By unity of possession of the land; and 3. By severance of the right of common.

With regard to the first mode, by release, it has been said that if the commoner releases any part of the land from the right of common, it will operate as an extinguishment of the right in every other part. This is the consequence of the *entirety* of the right, throughout the whole land, subject to it.

2. To constitute a *unity of possession* that will extinguish a right of common, the person must have an estate in the land to which the common is annexed, and in that where the right of common exists, *equal in duration*, and *all other circumstances of right*.

3. A *severance* takes place so as to extinguish the right of common, when the common was annexed to a messuage or tenement, and the owner conveys away the messuage or tenement, excepting the common. This creates an extinguishment of the common. (*Cruise's Dig. title 23.*)

A right of common, which has been extinguished by unity of possession may be revived by a new grant. (*Id.*)

The remedy for a disturbance of any right of common is by a civil action, under the code of procedure, according to the nature of the injury and the relief sought.

SECTION II.

Of Ways.

A right of way is the privilege which one or more persons enjoy of going over another person's land. It is an incorporeal heredita-

ment, savoring of the realty, and is entirely distinct from public highways leading from town to town.

The right of way over another man's soil may be claimed in various ways. 1. By grant; as where the owner of a piece of land grants to another the liberty of passing over his lands in a particular direction. The grantee thereby acquires a right of way over these lands.

2. It may arise from an *exception and reservation* to the grantor, who parts with his estate in other respects to the grantee. Thus, where B. was seised in fee of an alley in a certain village leading from the public highway to his other lands, granted the same in fee, "*excepting and reserving* in and out of the said granted lot, &c. to the said B., his heirs and assigns, a right of way, as well a foot way as a horse way, and a way for his and their carts, carriages and servants, in, out and through the granted lot, at all times," and protecting the enjoyment of the way by a condition, it was held that this was a valid exception and reservation, and that the grantor could maintain ejectment for the whole land on a breach of the condition by the grantee. (*Jackson v. Allen*, 3 Cowen, 220.) Although a new trial was granted in that case, it was not upon the ground that the exception or condition was invalid, but for a misdirection of the judge.

3. The right of way may arise by *prescription* and immemorial usage. Parol evidence of twenty years' uninterrupted use, adverse or in hostility to the owner of the land, will authorize the inference of a grant; for a right of prescription supposes a grant to have been originally made of the way. (*Hamilton v. White*, 4 Barb. 61, *per McCoun*, P. J. delivering opinion of Sup. Court, 2d district. *Lansing v. Wiswall*, 5 Denio, 213. *Williams v. Safford*, 7 Barb. 313. 1 Saund. 323, n. 6.)

4. A right of way over another man's land may arise *from necessity*. Thus, if a man having a close surrounded by his own land, or by his own land and the land of another, grants the close, the grantee and those claiming under him have a right of way by *necessity*, through the lands of the grantor, as incident to the grant. (*The New York Life Ins. and Trust Co. v. Milnor*, 1 Barb. Ch. 353. *Holmes v. Seeley*, 19 Wend. 507.) The grantor in such a case may designate the way in the first instance, and it is then a way by grant. But if he fails to do so, the grantee must select for himself, and the court would no doubt extend a liberal indulgence to the exercise of his discretion. Nothing short of evident abuse ought to invalidate the one thus designated and used, as the grantor or those under him

would be in fault for not assigning a way themselves. (*Holmes v. Seeley*, 19 *Wend.* 510.)

A right of way by prescription does not involve the right to travel at random over another's land, nor is such user for twenty years evidence of a prescriptive right of way over any particular part of it. (*Id.*)

The right of way of necessity over the lands of the grantor, in a conveyance in favor of the grantee and those claiming under him, is not a perpetual right of way; but continues only so long as the necessity exists. If the grantee of the dominant tenement, or those claiming the same under him, should afterwards, by purchase or otherwise, acquire a convenient way over his own lands to the tenement in favor of which the way of necessity previously existed, the way of necessity over the land of the original grantor of such tenement will cease. So if a convenient way to such tenement is subsequently obtained by the owner thereof by the opening of a public highway to, or through such tenement. The case is otherwise where the owner of land has a right of way to the same over the premises of another, by prescription or by express grant. A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessity of the case requires. (*N. Y. Life and Trust Co. v. Milnor*, 1 *Barb. Ch.* 362, *per Walworth, Ch.*)

A right of way can only be used according to the grant, or the occasion from which it arises. If the right be limited to go to a particular place, the party having the right cannot go beyond it. If it be limited to a particular mode of business it cannot be converted into another mode, more injurious to the soil.

The owner of the right of way after it has been designated or selected, has a right to build the road so as to make it convenient for the purposes for which it was designed; and he has a right to make all necessary repairs.

But he has no right, when it becomes out of repair, from his own fault, to go out of it upon the adjoining close. Nor if it becomes obstructed by the grantor, can he lawfully go out of the way upon the grantor's land, to avoid the obstruction, though he do no unnecessary damage. His remedy is to remove the obstruction, and he has a right of action against the grantor for placing them there. (*Williams v. Safford*, 7 *Barb.* 309. *Boyce v. Brown*, 7 *id.* 80.) It is otherwise with regard to a public highway. A person traveling on a public highway, and finding a place foundrious and impassable,

has doubtless a right to remove enough of the fences in the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury. (*Williams v. Safford*, *supra*, per Willard, J. *Taylor v. Whitehead*, 2 Doug. 748, per Mansfield, Ch. J.)

When a right of way is granted, without any designation of the place in the deed, it may become located by usage for a length of time; and being so located it cannot be changed afterwards by the grantor, without the consent of the grantee. But if it be so changed, and the grantee use it in its new form, for a length of time, his consent and acquiescence to the alteration will be presumed. (*Wynkoop v. Burger*, 12 John. 222.)

The grantee of the right of way and not the grantor must keep it in repair, (*Id. Taylor v. Whitehead*, *supra*,) unless there be covenants in the grant to the contrary. (*Rider v. Smith*, 3 T. R. 766. *Doane v. Badger*, 12 Mass. Rep. 65. *Wynkoop v. Burger*, *supra*.)

As a right of way is an incorporeal hereditament, it is not *divested* by any conveyance of the estate out of which it is granted. (*Shep. Touch.* 23.)

An easement acquired by deed cannot be lost by nonuser. To be thus lost it must have been acquired by user. The doctrine of extinction by disuse does not apply to servitudes or easements created by deed. In the one case the mere disuse is sufficient; but in the other there must not only be *disuse* by the owner of the land dominant, but there must be an actual *adverse user* by the owner of the land servient. (*Smiles v. Hastings*, 24 Barb. 49. *White v. Crawford*, 10 Mass. Rep. 182. *Arnold v. Stevens*, 24 Pickering, 106.)

But when the right of way is acquired by *user*, the same rule of presumption applies to an unexplained *nonuser* that confessedly results from a long and uninterrupted *user* of such right. In the last case a *grant* is presumed, and so in the former a *release* may be inferred. (*Doe v. Hilder*, 2 Barn. & Ald. 791, by Abbott, Ch. J. *Moore v. Rawson*, 3 Barn. & Cres. 332. *Hoffman v. Savage*, 15 Mass. Rep. 130.) A shorter period of nonuser should not authorize the presumption of a release, than is required to afford evidence of a grant. (*Emerson v. Wiley*, 10 Pick. 310.) Should a right of way be assigned to a dowager, over land of her husband, with her dower, the easement would cease with the estate in dower. (*Hoffman v. Savage*, *supra*.)

A right of way may be extinguished by a unity of seisin and pos-

session, and revived again by severance. (*Cruise's Dig. title 24, Ways.*)

The constitution of 1846 provides that private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, must be paid by the person to be benefited by the proceeding. (*Art. 1, § 7.*) This constitutional provision was made in consequence of a doubt cast over the power of the legislature in this respect, by the decision of a majority of the supreme court in 1843, in the case of *Taylor v. Porter*, (4 *Hill*, 140.) The necessity of some power in the government to enable the owner of land, who cannot acquire a right of way by grant, to connect his freehold to a public road by a way over lands of another, against the consent of the latter, had been felt at an early day; and provision was made by the colonial authorities, before the revolution, for such relief. The authority of the legislature to authorize the laying out of a private road through the lands of another, without his consent, was never questioned till the case of *Taylor v. Porter*, (*supra.*) The existence of this power in the government, whatever it was before, is now placed beyond the reach of opposition, and is a valuable attribute of legislative sovereignty.

The act of 1801, to regulate highways, contained suitable provisions for laying out private roads, limiting their maximum width to three rods, and providing for an inquiry by a jury as to the necessity of the road, and assessing the damages to be paid by the applicant. (1 *K. & R.* 594. 2 *R. L. of 1813*, p. 276, §§ 20-23.) The existing law on the subject was passed in 1853. (*Ch.* 174, 2 *R. S.* 400, 5th ed.) It contains minute directions with respect to the application for the road to the commissioners of highways of the town, the selection and summoning of a jury to inquire into the necessity of the road, the notice to the parties interested, the appraisal and payment of the damages. It provides that a record of the proceedings shall be filed in the office of the town clerk of the town, and grants an appeal to the county judges of the county, on the application of any aggrieved party.

The private road thus laid out can be used only by the applicant, and be converted to no other use than a road; and the owner or

occupant of the land through which it is laid out is not permitted to use it as a road, unless he shall have signified his intention to that effect to the jury or commissioners who ascertained the damages sustained by the laying it out, before the same are ascertained. (2 R. S. 402, 5th ed.) The width of the road is not to exceed three rods, and it is to be kept in repair by the owner of it. It is, however, made the duty of the commissioners of highways of the town, to credit such persons *as live on private roads* and work the same, so much on their assessments as such commissioners may deem necessary to work such private road; or to annex such private road to some of the highway districts. (2 R. S. 389, 5th ed. § 41.) This provision was copied from the former law. (2 R. L. of 1813, p. 277, § 21.) It applies only to cases where the owner of the road lives on the same, and it is therefore the means by which he connects his residence with the public highway. In other cases, the road is exclusively his own for travel, and must be built and repaired by him as in the case of private ways by grant, or prescription, or of necessity.

In Massachusetts, it has been held, that all the owner of a right of way can claim is the use of the surface, for passing and repassing, with a right to enter upon and prepare it for that use, by leveling, graveling, plowing or paving, according to the nature of the way granted or reserved; that is, for a footway, or a way for all teams and carriages. (*Atkins v. Bordman*, 2 Met. 467, *per Shaw, Ch. J.*) The case in which the foregoing observations were made arose out of a reservation of a way in urban property, and not under a statute like that of New York.

But it is believed that the same principle is applicable to private roads laid out in pursuance of the New York statute. There is no provision for fencing such road; and the damages to be assessed are such only as are presumed to be sustained by the owner or occupant of the land by reason of the opening of the road. That damage will be the injury to the soil by constructing the road, and the inconvenience resulting to the owner or occupant by reason of the easement of a way being laid over the land. In other respects, the rights of the original owner or occupant are undisturbed. He can depasture it, or cultivate the ground in any other manner not inconsistent with the enjoyment by the other party of the easement of a way. The prohibition of the owner or occupant of the land to use it *as a road*, unless he signified his intention so to do at the time of the appraisal

of damages, contains an implication, that he may use it for all other purposes not inconsistent with the use of it as a road, whether he signifies his intention so to do or not. (1 *R. S.* 517, § 79. 2 *id.* 402, § 118, 5th ed. *Adams v. Emerson*, 6 *Pick.* 57.)

The usage with respect to fencing private roads laid out under the statute, is not uniform. If a fence be erected by the owner of the land on the line of the road, without the consent of the owner of the way, it must give the full width set off by the commissioners, and an action will lie if it encroaches upon it. (*Herrick v. Stover*, 5 *Wend.* 580.) But whether fenced or not, the owner of the soil through which it passes has no right to use it as a road with his teams, if he disclaims all intention of using it when the damages were assessed. (*Lambert v. Hoke*, 14 *John.* 383.)

The supreme court, in *Bront v. Becker*, (17 *Wend.* 320, 322,) seem to think that the statute with respect to division fences is not confined to the owners of the fee of adjoining lands or of any other particular estate; but from the generality of the expression, may properly include any person having an interest of any description in the adjoining lot. (1 *R. S.* 353, § 30.) In that case one of the owners was seised in fee, and the other a mere tenant at will. On that principle it would seem that when a division fence has been erected on the line of the way, any dispute concerning the same may be settled by any two of the fence viewers under the statute.

In conclusion, on this branch of the subject it is to be remarked, that all the preceding observations relate to private ways of the most extensive character. The greater includes the less. There are three kinds of ways, viz: 1, a foot way; 2d, a foot way and horse way. The 3d embraces the other two, and is called a cart way. This latter is the kind of way contemplated by the statute relative to private ways, and is the most extensive that can be granted, against the consent of the owner of the soil. It is believed that a foot way, or a foot and horse way may be granted under the statute. In such a case the owner of the way would be a trespasser if he used it for any other purpose.

A right of way may be extinguished by unity, when it is a way of ease or pleasure; but otherwise if it be a way of necessity. (1 *Saunders*, 326, *n. c.* 6 *Cruise's Dig. tit.* 24, § 23 and note.)

SECTION III.

Of Franchises.

A franchise was defined by the supreme court, in a leading case, to be a royal privilege, or a branch of the prerogative, subsisting in the hands of a subject, and may arise from the king's grant, or, in some cases, may be held by prescription which presupposes a grant. Immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, are franchises. The right of banking, since the restraining act, is a privilege or immunity subsisting in the hands of citizens by grant of the legislature, and a franchise. (*The People v. Utica Ins. Co.* 15 John. 358.) The same definition is given by the elementary writers. (2 Black. Com. 37. *Cruise's Dig. tit.* 27, § 1.) Franchises are, even in this country, extremely numerous, and a few only can be noticed in this treatise.

The case of banking institutions, mentioned in the case just cited, affords an example. The banks formed under the general law of this state have long since been held to be corporations, and of course are franchises. (*Warner v. Beers*, 23 Wend. 103. *Supervisors of Niagara v. The People*, 7 Hill, 504. *Gifford v. Livingston*, 2 Denio, 380. *Gillet v. Moody*, 3 Comst. 479, 485, 486. *Talmadge v. Pell*, 3 Seld. 328. *Curtis v. Leavitt*, 15 N. Y. Rep. 9. *Leavitt v. Blatchford*, 5 Barb. 11.) They are recognized as corporations by the constitution of 1846. (*Article* 8, § 3.)

The franchise of a corporation consists in its attribute of continued succession, derived from its charter ; the right to have a name and common seal ; to sue and be sued ; to make by-laws ; to have capacity to transact business. (1 R. S. 599. *Dartmouth College v. Woodward*, 4 Wheat. 518-636, by Marshall, Ch. J. *Bank of Augusta v. Bank of United States*, 13 Pet. 519, 541, 587.) Hence, to be a corporation, is a franchise.

The right to erect a *wharf* on tide water, and take toll for its use, is a franchise, and must flow from a grant from the sovereign power, or be upheld by prescription. (*Wiswall v. Hall*, 3 Paige, 313.)

So a *right* to erect and maintain a *dam* in a public river is a franchise, an incorporeal hereditament, conferred by the legislature ; but

the dam is not. For the invasion of the franchise the proper remedy was case, under the former practice, but only trespass for a direct and immediate injury. (*Wilson v. Smith*, 14 *Wend.* 324.)

On the same principle, the right to erect a bridge and take toll from those who pass over it, is a franchise which the courts will protect. (*The Mohawk Bridge Co. v. The Utica and Sch. R. R. Co.* 6 *Paige*, 554. *Charles River Bridge v. Warren Bridge*, 11 *Peters*, 420.)

But the grants of these exclusive privileges are to be construed strictly, and are not to be extended by implication. The government, by granting a charter for a bridge, does not diminish its own power to grant a like franchise to others which will accommodate the same line of travel. It does not bind itself by implication to withhold a similar grant, although it may lessen the profits of the franchise first granted. (*Charles River Bridge v. Warren Bridge*, *supra.* *Auburn and Cato Plank Road Co. v. Douglass*, 5 *Seld.* 444.)

Chancellor Kent, in the *Newburgh Turnpike Co. v. Miller*, (1 *John. Ch.* 101,) held that when one has the grant of a ferry, bridge or road, with the exclusive right of taking toll, the erection of another ferry, bridge or road, so near it as to create a competition injurious to the franchise, is, in respect to such franchise, a nuisance; and that the court of chancery would, by perpetual injunction, protect the enjoyment of the statute franchise. It has been supposed that the principle of this case is subverted by the decision of the United States supreme court in the *Charles River Bridge case*, (*supra.*) but the cases are not strictly in conflict. In the last case the question arose whether the legislature was estopped by their grant of a toll bridge from granting another which should be free; but in the former the question was whether an *individual* could by his *own act* prevent the operation of a public grant. It must be conceded, however, that though the *Charles River Bridge case* is not in conflict with the case of the *Newburgh Turnpike v. Miller*, (*supra.*) the case of the *Auburn and Cato Plank Road Co. v. Douglass*, (*supra.*) flatly contradicts it. In the latter case, the interference with the franchise proceeded not from the government which granted it, but from an individual, and if that can be law, the case of *Newburgh Turnpike v. Miller*, (*supra.*) was erroneously decided.

The doctrine that the legislature is not estopped by a prior grant from making another which will interfere with it, though questioned by some, is too firmly established to be shaken. (*Charles River*

Bridge v. Warren Bridge, supra. Cruise's Dig. tit. 27, § 29, note. Auburn and Cato Plank Road Co. v. Douglass, supra. The Oswego Falls Bridge Co. v. Fish, 8 Barb. Ch. 547. The Mohawk Bridge Co. v. The Utica and Sch. Rail Road Co. 6 Paige, 554. The Enfield Toll Bridge Co. v. The Hartford and New Haven R. R. Co. 17 Conn. Rep. 454. Thompson v. The New Haven and Harlem R. R. Co. 3 Sandf. Ch. 625.) In the case of the *Auburn and Cato Plank Road Co. v. Douglass, (supra,)* Selden, J. in delivering the opinion of the court of appeals, assumes that the *Charles River Bridge case* overrules the doctrine of Chancellor Kent in the *Newburgh Turnpike v. Miller*, and the note to 3 *Kent's Com.* 459, takes the same view of the matter. The case of the *Charles River Bridge v. Warren Bridge* does, indeed, overthrow the doctrine of Chancellor Kent, that in every grant of a franchise there is an implied obligation in the government, not to interfere with it, or materially impair its value, by a like grant to others. But that is a different question from the power of a court of equity to restrain an individual, who acts upon his own authority, from injuring the franchise. It was on this ground that the court of appeals, in 1853, on the first argument of the case of the *Auburn and Cato Plank Road Co. v. Douglass*, were equally divided; four being for sustaining the decision of the court below, (12 *Barb.* 553,) and four for reversal. The decision given on the second argument, reported in 5th Selden, does not notice the point on which the court differed on the first argument; but decides the case upon the same principle as if the legislature had granted to the defendant a like franchise to construct a road upon his own land, and he had constructed it under that authority, and not of his own authority as owner of the land.

The grant of a charter to a rail road company, or to a plank road company, is also a franchise. Indeed, there is probably more money invested in rail roads, on the faith of these grants, than on any other franchises in this country. The general rail road act, which authorizes the forming of these associations, and makes them incorporations, confers upon them the power of taking and holding real estate and other property for the purposes of their road, and among other things to borrow such sums of money as may be necessary for completing and finishing or operating their rail road, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and FRANCHISES, to secure the payment of

any debt contracted by the company for the purposes aforesaid. (*Act of 1850, pp. 224, 225.*) Thus, the franchise of the road is treated as an incorporeal hereditament, savoring of the realty, and the subject of mortgage and sale. The bonds to secure which the mortgage is authorized to be given, are held by the highest authority to be negotiable instruments. (*White v. Vermont and Mass. R. Road Co. 21 How. U. S. Rep. 575.*) A different rule prevails in England. (*White v. McMaine, 6 M. & Welsb. 200. Enthoven v. Hoyle, 9 L. and Eq. Rep. 434.*)

The effect of such mortgage and of a foreclosure under it, belongs to a different part of this treatise. [See Mortgages.]

The special privileges granted to towns, counties or cities, are franchises. Thus, the ferries belonging to the city of New York, the right to wharfage, to keep markets, and various other incidents in their charter, belong to the same class.

SECTION IV.

Of Annuities and Rents.

The principal difference between an annuity and a rent charge, is that the remedy for the first is against the person alone, and the other is a charge upon the land. An *annuity* is a yearly sum of money chargeable only on the *person* of the grantor. If it be granted to a man and his heirs, it is a fee simple personal. (*Co. Litt. 2 a, 144 b.*) If the grant be to a man and his heirs, the heir of the grantor is not bound, unless the grant be for him and his heirs. (*Id.*) An annuity may be charged on land, and the remedy of the grantee may, at his election, be real or personal. (*2 Bl. Com. 40, n.*) An annuity is said to be real estate, and descendible to the heirs.

Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal. (*2 Bl. Com. 41. Co. Litt. 144.*) It is not necessary that it should be in money; for it may consist of horses, corn or manual services; as to plough so many acres, or to labor so many days, and the like. The profit thus reserved must be certain, or capable of being reduced to a certainty. (*Van Rensselaer v. Jones, 5 Den. 449.*) It must *issue out of* the thing granted, and not be part of the thing itself. It must issue out of lands and *tenements corporeal*. It cannot be granted of a franchise or a common, for then there is nothing into which the landlord can enter to

distrain. The agreement to pay for the use of an incorporeal hereditament, as a common or a way, is a mere *personal* agreement. It must issue *yearly*; though it may be payable monthly, or every third year, and the like. But as it issues out of lands, the profits of which arise annually, and as there must be some criterion by which the amount can be ascertained, the year is the proper standard of duration by which it is to be measured.

At common law there were three kinds of rent, namely, rent service, rent charge, and rent seck.

Rent service is when the tenant holds his lands by fealty and certain rent. It was formerly so called because rent consisted of some corporeal service, as ploughing the lord's land. To this kind of rent distress was inseparably incident, whether the lease contained any clause of distress or not. It was required that the landlord should retain the reversion, and that the rent should be certain, otherwise the lessor could not distrain, unless there was a clause in the lease authorizing it, in which case it would be a rent charge. (*Littleton*, § 217. *Van Rensselaer v. Hays*, 5 *Smith*, 68. *Same v. Ball*, *Id.* 100; *S. C.* 27 *Barb.* 104. *Same v. Chadwick*, 24 *id.* 333. *Crabbe's Law of Real Property*, vol. 1, 169, § 151. *Crwise's Dig. ch.* 28. *Cornell v. Lamb*, 2 *Cowen*, 652.)

A rent charge is any rent granted out of lands by deed with a clause of distress, whence it derives its name, because the land is charged with distress by the express provision of the parties, which it would not otherwise be. This may arise as well in a reservation in a grant in fee, as by a direct grant of a rent charge by the owner of the estate. It is thus expressed by *Littleton*, § 217: if a man, by deed indented at this day, makes a lease for life, the remainder over in fee, or a feoffment in fee, and by the same indenture he reserves to him and his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, &c., such rent is a rent charge. (*See same cases.*)

A rent seck was properly a rent reserved by deed without clause of distress. (*Litt.* § 217.) It might be reserved in a grant in fee. (*Id.*)

But the distinction between them has been done away in England, by the 4 Geo. 2, ch. 238, which gives the same remedy for a rent seck as for a rent service, or a rent charge. The revised statutes of New York give the grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignee of the

lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, the same remedies by entry, action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, as their grantor or lessor had or might have had if such reversion had remained in such lessor or grantor. (3 *R. S.* 37, § 17, 5th ed.) They also give the lessees of any lands, their assigns or personal representatives, the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or relating to the title or possession of the premises demised. (*Id.* § 18.) And the provisions of the last two sections are extended as well to grants or leases in fee reserving rents, as to leases for life or years. (*Id.* § 19. *Nicoll v. The New York and Erie Rail Road*, 12 *Barb.* 460, *affirmed by court of appeals*, 2 *Kernan*, 121.)

It was held in England, at an early day, that an assignee of a rent charge in fee could have covenants against the grantor, because it is a covenant annexed to the thing granted. Sir Edward Sugden, afterwards Lord St. Leonards, lord chancellor of England, in his excellent treatise on Vendors, after reviewing the British authorities, says, that the rent charge is an incorporeal hereditament, and issues out of the land, and the land is bound by it; the covenant may therefore well run with the rent in the hands of the assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter of a personal nature. (2 *Sug. Vend.* 177, *Perkins' ed.* *Brewster v. Kidgell*, 12 *Mod.* 166. *Van Rensselaer v. Hays*, 5 *Smith*, 80, *per Denio, J.* approving the above.) The learned author does not put it upon the construction of the 32 Henry 8, ch. 34, which gave the action by and against the assignees of estates for life and years, and which was adopted in this state in 1788, but on the theory and legal effect of such covenants.

A different view of the subject was taken in the supreme court of this state as early as 1800, in *Devises of Van Rensselaer v. Executors of Platner*, 2 *John. Cas.* 24,) when it was held that the devisee of the grantor in whose favor a rent charge had been reserved in a lease in fee, could not maintain an action in his own name for rent in arrear; in other words, the covenant did not run with the land, and the case was not aided by the re-enactment, in 1788, of the statute of Henry 8. It is evident that if Sugden be correct, as it is

believed he was, the case was erroneously decided ; but it was not taken to the court of errors, but acquiesced in for the time being. This decision, it is supposed, led to the act of 1805, (*Laws of 1805, ch. 98, p. 254,*) entitled an act to enable grantees of reversions to take advantage of the conditions to be performed by lessees, which, after reciting that it had been doubted whether the provisions contained in the act entitled “ An act to enable grantees of reversions to take advantage of the condition to be performed by lessees, thereby intended to be amended, extended to any but assignees of reversions dependent on estates for life or years ;” and further reciting that leases or grants in fee, reserving rents, had long since been in use in this state, and to remove all doubts respecting the true construction of the aforesaid act, it was enacted that all the provisions of said act and the remedies thereby given, should be construed to extend as well to grants or leases in fee reserving rents, as to leases for life or years, any law, usage or custom to the contrary notwithstanding. This act was re-enacted in the revised laws of 1813, (*vol. 1, p. 364, § 3,*) and in the revised statutes of 1830, before cited. The recital is evidence of the prior usage with respect to rents reserved in leases or grants in fee, and affords some evidence that such leases were common, and that the covenant for the payment of the rent was supposed to run with the land.

The act of 1805 was evidently a declaratory act. Its repeal in 1860 (*L. of 1860, p. 675*) does not controvert the prior usage, nor take away rights which existed before.

The statute *quia emptores*, (18 *Ed. 1,*) provided that if a person made a feoffment in fee, or gift in tail, with a limitation over in fee, the feoffee or donee will hold of the superior lord by the same services which the feoffee was bound to perform to him ; from which it followed, that upon a conveyance of this kind, no rent service could be reserved to the feoffer or donor, because he had no reversion left in him ; and as the feoffee or donee did not hold of him, he was bound to do him service. But if, upon a conveyance in tail or fee or for life, the donor keeps the reversion and reserves to himself a rent, it will be a rent service, because fealty and a power of distress are incident to such reversion. (*Cruise's Dig. tit. 28, ch. 1, § 5.*) Before the statute, according to Littleton, (§ 216,) if a man made a feoffment in fee simple, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might distrain of common right, and if there was no reservation of any rent, nor of

any seisin, yet the feoffee held of the feoffor by the same service as the feoffor held of his lord next paramount. But since the statute, as appears by Littleton, § 217, cited on a preceding page, (p. 204,) if a rent be reserved in a deed in fee, it is no longer a rent *service*; but if there be a clause in the deed reserving to the grantor and his heirs a certain rent, with authority to him or his heirs, if the rent be behind, to enter and distrain, it is a rent *charge*. Hence it is quite clear that in England, after the statute *quia emptores, rents charge* were reserved or granted in estates in fee simple, with a power of distress. That class of conveyances was frequent in the colony, and was usually denominated a durable lease, or a lease in fee; thus adopting a term which in England was applicable only to an instrument creating a less estate than the lessor had in the premises, which is the true notion of a *lease*, in the English books of conveyancing.

It has been doubted whether the statute *quia emptores* was ever in force in the colony of New York. (*Jackson v. Schutz*, 18 John. 179. *De Peyster v. Michael*, 2 Seld. 502.) If by this is meant that the statute was not re-enacted by the colonial legislature, the assertion is probably true; for it was never enacted here till the substance of it was incorporated into our statute of tenures after the revolution. (*Act of Feb. 20, 1787*, 1 K. & R. 64. 1 R. S. 718.) But it is believed that our ancestors brought with them, in emigrating to this country, such parts of the common law, and such of the English statutes altering or amending the same, as were of a general nature and applicable to their situation. (*Van Rensselaer v. Hays*, 5 Smith, 73. *Bogardus v. Trinity Church*, 4 Paige, 178, affirmed, 15 Wend. 111. *Canal Commissioners v. The People*, 5 id. 445. *Commonwealth v. Leach*, 1 Mass. Rep. 60. *Same v. Knowlton*, 2 id. 535.)

The durable lease or grant in fee reserving rent, with a power to distrain, was a common conveyance in this state both before and since the revolution. Such lease creates a valid rent charge, which descends to the heirs, and the covenant runs with the land into whosoever hands it lawfully passes. (*Van Rensselaer v. Hays*, 19 N. Y. Rep. 76. *Notes 235 to Co. Litt. 143 b*, by Mr. Hargrave, and the cases before cited. *Van Rensselaer v. Ball*, 5 Smith, 100; *S. C.* 27 Barb. 104. *Bradbury v. Wright*, Douglass, 624, note to do. 627.)

It has not been unusual, in adopting the law of the parent state, to introduce changes to make it conform to the circumstances, wants

and conveniences of the country. These changes have sometimes been the result of usage alone, and sometimes of statutory regulations and judicial construction. It is upon this principle that the term *lease*, which, in England, denotes a contract for the possession and profits of land for a determinate period, with a recompense of rent, payable in money or other things; leaving a reversion in the grantor, with us, is indiscriminately used, whether the estate granted be for life or years, or in fee. (*Bac. Abr. tit. Leases.*) Grants in fee, reserving rent, with a clause of distress and re-entry, have long been called *leases* in fee, or durable leases, in this state, both in statutes and judicial decisions. (*Laws of 1805, ch. 98. 1 R. S. 748, § 25. 3 id. 37, 5th ed. De Peyster v. Michael, 2 Seld. 467. Jackson v. Collins, 11 John. 1. Van Rensselaer v. Jewett, 5 Denio, 121. Same v. Jones, 2 Barb. S. C. R. 643. Same v. Hayes, 5 Denio, 477. Same v. Snyder, 3 Kern. 299. Van Rensselaer v. Smith, 27 Barb. 104.*)

In the foregoing cases an estate in fee reserving rent with a clause of distress and re-entry, is called a *lease*, and the relation of landlord and tenant is spoken of as subsisting between the parties. The party entitled to the rent is called the landlord, and the party liable to pay it, the tenant. And the cases were held to be within the statute giving a right of re-entry to the landlord for the non-payment of the rent.

There are numerous other cases in the books in which we have used common law terms in a different sense from that which they bore in the mother country, or in the same sense, with some essential modifications. Our courts, for example, have held that rail road bonds are negotiable securities, contrary to the notions of British lawyers. (*White v. Vermont and Mass. R. R. 21 How. U. S. Rep. 575.*)

Though rents are usually reserved on leases, they may be reserved on a release, a bargain and sale, and lease and release. (*Cruise's Dig. tit. 28, ch. 1, § 25.*)

With regard to the person to whom rent may be reserved upon a grant or lease, it is said by Littleton that it can only be to the grantor or lessor, or to his or their heirs, and in no manner can it be reserved to a stranger. (*Litt. § 346.*)

A rent reserved *generally*, without specifying to whom payable, will go to the lessor, and after his death to his heirs. If the reservation be to the lessor and his heirs, the effect will be the same, if the lessor was seised in fee. (*1 Co. Litt. 47 a.*)

With respect to the estate which may be had in a rent, it depends on the nature and duration of the estate out of which it issues. A rent charge may be limited to a man and his heirs, which of course gives him an estate in fee simple in the rent. Leases for years, lands held for a term of years, and estates held *per autre vie*, are treated by the revised statutes as personal assets, and required to be inserted in the inventory of deceased persons. Rent reserved to the deceased, and which had accrued at the time of his death, is also a part of the personalty, whether it arose out of a rent seisin or a rent charge. (2 R. S. 82, 83.)

A rent charge is subject to *dower* and *curtesy*. (Co. Litt. 32 a.) So also is a rent service, if the party entitled to the rent is entitled also to the reversion. (Id. 29 a.)

The tenant will be discharged from the payment of rent if he be evicted from the demised premises.

Such eviction to constitute a bar, must have taken place before the rent claimed fell due. (McCarty v. Hudson, 24 Wend. 291. Watts v. Coffin, 11 John. 495.)

When the lessor enters wrongfully into part of the demised premises, the tenant is discharged from the payment of the *whole* rent till he is restored to the whole possession.

When a party, after executing leases of portions of his farm to several tenants, granted the whole farm, with the reversion of the demised premises, to a tenant in fee, reserving an annual rent, and after such grant, entered upon the demised premises and distrained the goods of the original tenants for rent accrued subsequent to the grant of the whole estate, it was held that such entry and distress amounted to an eviction of the principal tenant, and worked a suspension of the rent. (Lewis v. Payn, 5 Wend. 423.)

A *physical* eviction by the landlord is not indispensable to relieve the tenant from liability for rent. It is sufficient if the landlord intentionally and injuriously disturbs and interferes with the beneficial enjoyment of the premises. (Cohen v. Dupont, 1 Sandf. 260.) Where the demised premises were part of a house, and the landlord made the residue a resort of lewd and disorderly men and women, and a place of prostitution, the court of errors of New York held it to amount to an eviction, and properly proof under the usual plea. (Dyett v. Pendleton, 8 Cowen, 727, reversing the previous case, 4 id. 581.)

But to make out a constructive eviction, there must be an inter-

ference with the actual use or occupation of the premises, a deliberate disturbance of the possession, depriving the tenant of a beneficial enjoyment of the premises. And, therefore, when the landlord, a year and more before the expiration of the lease, willfully undertook to let the premises, and posted a bill on the building, but desisted before the commencement of the last year, it was held not to be a constructive eviction. (*Ogilvie v. Hull*, 5 Hill, 52.)

The destruction of the building by fire *before* the time fixed for the commencement of the term, absolves the lessee, and entitles him to have the lease canceled. (*Wood v. Hubbell*, 5 Barb. 601.) But a destruction of them by fire *after* the term has commenced, affords no relief, either at law or in equity, against an express covenant to pay rent, unless the tenant has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. (*Gates v. Green*, 4 Paige, 355.)

But if the tenant merely *hires rooms* in a building, which is subsequently destroyed by fire, his interest ceases with the destruction of the building, and he is not liable for rent, though there be an express covenant to pay. (*Kerr v. The Merchants' Exchange*, 3 Edw. Ch. R. 315. *Graves v. Berden*, 29 Barb. 100.) In *Izon v. Gorton*, (5 Bing. N. C. 501,) the premises were not *destroyed*, though rendered untenable, until repaired by the landlord; which repairs were made by him, and notice thereof given to the defendant when they were completed. The tenant was held to be liable.

The usual and safe course is, to have suitable stipulations in the lease itself, excusing the tenant from the payment of rent, in case the premises are casually destroyed by fire, without his fault. And the covenant should be so framed as to excuse from rent in case the premises were destroyed by lightning, or other cause, without being burned, if the destruction were without the fault of the tenant. (*Babcock v. The Montgomery Co. Mut. Ins. Co.* 4 Comst. 326.) [See several forms of leases with the fire clause, in the Appendix.]

Rent, whether it be a rent service or a rent charge, may be apportioned. This may arise either by a grant of a part of the reversion of the land out of which it issues, or by granting a part of the rent to one person and a part to another. (*Per Abbott, Ch. J. in Bliss v. Collins*, 5 Barn. & Ald. 876.)

Littleton (§ 222) lays it down that if a man has rent *charge* to him and his heirs, issuing out of certain land, if he purchase a parcel of the land, all the rent charge is extinct and the annuity also,

because the rent charge cannot be so apportioned. But if a man have a rent *service*, and purchase parcel of the land out of which the rent issued, it shall not extinguish all, but for the parcel. He thus makes a distinction with regard to apportionment, between a rent charge and a rent service; and Coke adopts the same distinction. (*Co. Litt.* 148 a.) And it is laid down the same way in Bacon's Abridgment, title Rent, M. If a person has a rent charge issuing out of three acres of land, and releases all his right in one acre, the rent is said to be extinct; because all issues out of every part, and it cannot be apportioned. The owner of a rent charge may however release to the tenant a part of the rent and reserve the residue. (*Cruise's Dig. tit.* 28, *ch.* 111, § 19.)

The mode adopted by English conveyances, according to Mr. Cruise, to obviate the effect of the above doctrine, is for the grantee of the rent charge to join in the conveyance of the land, which operates as a release of the lands conveyed, from the payment of the rent charge; and to insert a proviso in the deed, that the other lands shall continue subject to the rent charge. This proviso operates, it is said, as a new grant of the rent charge. (*Id.* § 20.)

There are, however, many cases in which a *rent charge* or a *rent service* may be apportioned, as well by the act of the party as by the act of the law. Thus, when the grantee of a rent charge releases part of the rent to the tenant, such release will not extinguish the whole rent, but the part not released will still continue. (*Id.* § 22.) In *Rives v. Watson*, (5 *Mees. & Wels.* 255,) it was held that a rent charge may be divided by will, or by a deed operating under the statute of uses, so as to make the tenant liable, without attornment to several distresses by the devisees; and indeed by a conveyance of any kind.

In this country the distinction between a rent charge and a rent service, with regard to apportionment, does not seem to exist, as it did in the time of Littleton and Coke. Such rent is held to be apportionable by the act of the party, as well as by the act of the law. (*Ingersoll v. Sergeant*, 1 *Whart.* 337. *Farley v. Craig*, 6 *Halstead*, 263, 273, 279. *Cole v. Patterson*, 25 *Wend.* 456. *Van Rensselaer v. Chadwick*, 24 *Barb.* 333. *The People v. Haskins*, 7 *Wend.* 463. *Payn v. Beal*, 4 *Denio*, 407. *Van Rensselaer v. Jones*, 2 *Barb. S. C. R.* 643. *Same v. Jewett*, 2 *Comst.* 135, 141. 3 *Kent*, 470.)

Though in some of these cases other questions arose, yet they were all leases in fee reserving rent, with a clause of distress and re-entry,

and in some of them the direct question of apportionment of rent in such leases was considered. No distinction was made between the apportionment of a rent charge and a rent service. Both were placed on the same ground.

An apportionment according to the *quantity* of land is *prima facie* right, when there is no evidence as to its value. It will be assumed all to be of the same value. (*Van Rensselaer v. Jones, supra.*) An apportionment according to the value of the land is undoubtedly the most equitable. (*Same v. Chadwick, supra.*)

The common law was defective in not allowing an apportionment of rent as to time. If the tenant for life, after demising lands, should die on or after the day when the rent became due and payable, his executors or administrators might recover from the under tenant the whole rent due; but if he died *before* the rent became due, they had no remedy against the tenant for that part of the year. But the statute has obviated this, and given to the executors or administrators the right to recover the proportion of rent which had accrued before the death. (1 *R. S.* 747, § 22.)

The rule with respect to apportionment applies only to such services as are in their nature *divisible*. If, therefore, the rent be of a horse, a hawk, or the like, the landlord, by purchasing part of the tenancy, cannot throw the whole burden on the remainder; and therefore, as there can be no apportionment of such a rent, it shall be excited by such purchase. (*Litt.* 222. *Cruise's Digest*, tit. 28, ch. 111, § 28.)

The remedy in case of the non-payment of rent, underwent a great change in this state in 1846. By an act passed in that year, distresses for rent were abolished. (*Laws of 1846, ch. 271, § 1. 3 R. S.* 829, 5th ed.) A subsequent section enacts that wherever the right of re-entry is reserved and given to a grantor or lessor in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' previous notice of such intention to re-enter, in writing, be given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted or demised, for the satisfaction thereof. The no-

tice may be served personally on such grantee or lessee, or by leaving it at his dwelling house or place of abode.

The principal questions arising under this act have been as to its constitutionality, with reference to past transactions, and with respect to its application to grants or leases *in fee*, reserving a rent with a clause of re-entry. Both these questions have been decisively settled by the highest court of the state, and they are no longer open for discussion. As the statute only affects the remedy, and does not impair the obligation, of the contract, it has been adjudged that the enactment is within the undoubted power of the legislature. The right of re-entry, for the non-payment of rent, it was also held, may be reserved upon a conveyance in fee. (*Van Rensselaer v. Ball*, 19 *N. Y. Rep.* 100.) And where there is this right of re-entry in the lease or conveyance creating the rent, ejectment is the appropriate remedy, whether the lease be for life or years, or in fee simple. (*Id.* *Jackson v. Collins*, 11 *John.* 1. *Van Rensselaer v. Jewett*, 5 *Denio*, 121. *Same v. Hays*, 5 *id.* 477. *Same v. Jewett*, 2 *Comst.* 141. *Same v. Snyder*, 3 *Kernan*, 299. *The Mayor &c. v. Campbell*, 18 *Barb.* 156.) These cases show that no demand of the rent, at the day, is necessary, as at common law, but that the notice provided for in the 3d section of the act of 1846, (*supra*,) stands in the place of the evidence of a want of goods upon which to distrain. The language as well as the evident intent of the act applies as well to leases in fee, as to leases for life or years.

The revised statutes contain minute provisions for the proceedings in cases of this kind, which are to some extent modified as to form by the code of procedure. Whenever any half year's rent, or more, shall be in arrear from any tenant to his landlord, *and no sufficient distress can be found on the premises*, to satisfy the rent due, if the landlord has a subsisting right by law to re-enter for the non-payment of such rent, he may bring an ejectment for the recovery of the possession of the demised premises; and the service of a declaration thereon shall be deemed to stand instead of a demand of the rent in arrear, and of a re-entry on the demised premises. The notice, we have seen, under the 3d section of the act of 1846, is a substitute for the proof, formerly required, that no sufficient distress can be found; which is obviously a superfluous requirement, since the right of distress has been abolished. The service of the declaration under the former practice, has been superseded by the present mode of

commencing actions, under the code of procedure. The one is an equivalent for the other.

The landlord or owner of the rent is not confined to his action of ejectment, for the recovery of his rent. He may bring an appropriate action upon the covenant in the lease for the payment of the rent, and which, we have seen, is a covenant running with the land, and thus giving a right of action to the assignee of the rent in his own name, against the person who is the assignee of the lessee, the party charged with the payment of it.

The question whether interest is recoverable upon rents in arrear has given rise to much discussion, but has been settled in this state, in favor of the right to interest, whether the rent be payable in money or in produce, or any other thing. (*Van Rensselaer v. Jones, supra. Clark v. Barlow, 4 John. 183. Van Rensselaer v. Jewett, 2 Comst. 135. Lusk v. Druse, 4 Wend. 313.*) Though it could not be distrained for under the former law. (*Lansing v. Rattoone, 6 John. 43.*)

There are various other questions which often arise in the law of landlord and tenant, which we have not room to discuss. At common law the action for use and occupation of premises could not be maintained, if an actual demise were shown. The English statute of 11 Geo. 2, ch. 19, § 14, provides that when the agreement is not by deed, a landlord may recover "a reasonable satisfaction for the lands, tenements or hereditaments, *held or occupied* by the defendant or defendants, in an action on the case for the use and occupation of what was so *held or enjoyed*;" and if any agreement, not being by deed, shall be proved, "by which a *certain* rent was reserved, it may be used as an evidence of the quantum of the damages to be recovered." (*Comyn's Land. & Ten. 435.*) The statute of New York on the same subject varies, in some respects, from the above. It is enacted that any landlord may recover in any action on the case, a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed; and if any parol demise or other agreement not being by deed, by which a certain rent is reserved, shall appear in evidence on the trial of any such action, the plaintiff shall not, on that account, be debarred from a recovery, but may make use thereof as evidence of the amount of the damages to be recovered. (1 R. S. 748, § 26.) The former statute of New York was very similar to that of 11 Geo. 2. (1 R. L. 444, § 31.) The words "held or occupied" are to be found in both.

Under these words it has been adjudged that assumpsit for use and occupation will lie, although there has not been an actual occupation for the whole of the time in respect of which the action is brought; a *legal* possession being sufficient to maintain it, and the defendant being thus liable for constructive, as well as actual occupation. (*Pinero v. Judson*, 6 Bing. 206.)

The words "*held or occupied*" are not contained in the revised statutes. The words now are that a recovery may be had of "a reasonable satisfaction for the *use and occupation* of any lands or tenements, by any person under any agreement not made by deed." These words would seem to authorize a more restricted construction than the act of 11 George 2d, and to exclude a mere constructive holding. (*See per Beardsley, J. in Cleves v. Willoughby*, 7 Hill, 88.)

In *Westlake v. De Graw*, (25 Wend. 669,) the tenant hired the house for a year at a rent of \$601 annually, payable quarterly. He paid the rent for the two first quarters and then left the premises, alleging that they were uninhabitable by reason of intolerable stench in the basement. There was no fraud on the part of the landlord, and he actually sent a mechanic to ascertain the cause of the stench and to remove it, but the defendant refused to stay. The cause was ascertained to be dead rats under the steps of the house, which, with ordinary skill and attention by the tenant, might have been removed. It was readily removable when discovered, and was, in its own nature, of temporary duration. The court held that the landlord could recover for the remainder of the year, as for use and occupation, if the contract remained in force. The voluntary deserting of the premises by the tenant, for an inadequate cause, was held to be no defense to the action. Although the defendant did not actually occupy for the remainder of the year, he might have done so, and was not prevented by any wrongful act of the landlord. This, in short, was applying the same rule which the English courts would follow under the statute of 11 George 2d, and our courts under the former law. (*Starkie's Ev.* 853. *Comyn's Landlord and Tenant*, 450.)

But no action will lie under the statute for use and occupation when the defendant never went into possession of the demised premises under the agreement, either personally or by an agent or under tenant. (*Wood v. Wilcox*, 1 Denio, 37. *Croswell v. Crane*, 7 Barb. 191. *Beach v. Gray*, 2 Denio, 84.)

When the defendant enters under a parol demise, and afterwards

abandons the premises, and the landlord gives him notice that he will let them to another person, and does so accordingly, he cannot afterwards maintain an action for use and occupation against the original tenant for the period during which the premises were occupied by the tenant to whom the landlord has again let the premises, though the latter has proved to be insolvent. Such tenant can, in no sense, be treated as the agent or under tenant of the original tenant, and the latter is therefore not responsible to this action. (*Beach v. Gray, supra.*)

Nor can the action be maintained when the relation of landlord and tenant, between the parties, does not exist; and therefore it will not lie against a person who comes in under the plaintiff as a purchaser from him. (*Bancroft v. Wardwell, 13 John. 489.*) Nor will it lie against a tenant holding over, against whom summary proceedings are forthwith commenced on the expiration of the term by virtue of which he is ejected. (*Featherstonaugh ads. Bradshaw, 1 Wend. 134.*) The remedy in such a case is an action for the mesne profits, and which is not founded on contract.

But it will lie against a lessee by deed who holds over after the expiration of his term. The court said that the law in such a case creates a tenancy from year to year, and the tenant cannot be turned off without a previous notice to quit. (*Abeel v. Radcliff, 13 John. 297. Doe v. Bell, 5 T. R. 467.*)

It has sometimes been made a question whether the tenant can interpose as a defense the untenable condition of the premises. The revised statutes provide that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not. (2 R. S. 738, § 140.) The maxim *caveat emptor* applies to the transfer of all property, real, personal and mixed; and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject. A sale of provisions for domestic use, (*Van Bracklin v. Fonda, 12 John. 468,*) and a demise of ready furnished lodgings, (*Smith v. Murrable, 1 C. & M. 479,*) may be mentioned as exceptions; for as to them the law implies a warranty that the former are wholesome, and the latter free from nuisance. (*Cleves v. Willoughby, per Bradley, J. 7 Hill, 86.*)

There are some few English cases which tend to show that the tenant may quit the premises without being liable for use and occupation, if the jury find that the premises were unfit for proper and

comfortable occupation, and the defendant had quit them *bona fide* for that cause, as soon as he could get others. (*Cowie v. Goodwin*, 9 *Car. & Payne*, 378. *Salisbury v. Marshall*, 4 *id.* 65.) And there are several other cases to the like effect.

When there is no fraud in the landlord, or misdescription of the premises, and no particular agreement to put them in repair is made by the landlord, the tenant takes them for better or for worse, and the former is under no obligation to repair. (*Cleves v. Willoughby*, 7 *Hill*, 90, *per Beardsley, J.* *Mumford v. Brown*, 6 *Cowen*, 475. *Westlake v. De Graw*, 25 *Wend.* 669. *Comyn's Land. and Tenant*, 185. *Taylor's Land. and Ten.* 166.)

The statute against implying covenants is founded in wise policy, and will cause the tenant to exert his vigilance to detect the inconveniences before he takes the premises, or guard himself by proper covenants.

The law has given to the landlord various other remedies, besides those hitherto enumerated. The revised statutes contain suitable and minute provisions to enable the landlord to regain the possession of the demised premises, in case the tenant holds over, being in arrear for rent, or deserts the premises leaving them unoccupied and uncultivated. (2 *R. S.* 519. 3 *id.* 835, 5th *ed.*)

To bring a case within the statute, the conventional relation of landlord and tenant must exist. A grantor in possession after he has parted with his title, though he may be a tenant at sufferance, cannot be dispossessed under the act. Nor can a mortgagee enforce the agreement of the defaulting mortgagor to surrender possession. (*Evertson v. Sutton*, 5 *Wend.* 281. *Roach v. Cosine*, 9 *id.* 227. *Sims v. Humphreys*, 4 *Den.* 185.)

The statute, since its enactment in 1820, has been greatly improved and extended. It has been made applicable to a holding over after a sale of the premises under a judgment and execution and the forfeiture of the title; and the remedy has been given against a tenant or lessee for three years or more, who obtains a discharge under the insolvent act. (3 *R. S.* 836, § 28, *subd.* 3, 4, 5th *ed.* *Spraker v. Cook*, 2 *Smith*, 567. *Brown v. Betts*, 13 *Wend.* 29. *Hallenback v. Garner*, 20 *id.* 22.)

Rent may be *suspended*, or *extinguished*. The first is, in general, temporary in its operation; the last, final.

The entry of the landlord into part of the premises unlawfully,

works a temporary suspension of the whole rent. The landlord cannot apportion the rent by his own wrongful act. The suspension will cease, however, on a restoration of the premises to the tenant. (*Lewis v. Payn*, 4 *Wend.* 423. *Bac. Abr. tit. Rent, M. Co. Litt.* 148 b. 9 *Coke*, 135 a.)

An extinguishment is brought about by a union of the right to the land and to the rent issuing out of it, in the same person. This may be effected by a release of the reversion to the tenant, or by the surrender by the latter to the landlord. (*Nellis v. Lathrop*, 22 *Wend.* 121. *Decker v. Livingston*, 15 *John.* 479. *Shepard v. Merrill*, 2 *John. Ch.* 276. *Springstein v. Schermerhorn*, 12 *John.* 357.)

Rent is not extinguished by a bond being given for it. (*Cornell v. Lamb*, 20 *John.* 407.) Nor by the recovery of a judgment for it, until the later be satisfied. (*Chipman v. Martin*, 13 *John.* 240. *Drake v. Mitchell*, 3 *East*, 258.) Neither a bond or a judgment is of a higher nature than the rent, and the latter is therefore not merged.

We mentioned in the former part of this chapter, that we should, in conclusion, add some observations on such easements as bear an analogy to the topics already discussed. The right to the enjoyment of light, air and water, gives occasion to the application of some of the most interesting and important principles of law. These elements are common to all; and though they do not admit of an exclusive appropriation in the broadest sense of the term, they are nevertheless so essential to the enjoyment of real estate, that the individual owner may have such a property in them, that the law will protect from infringement.

The right, with respect to the light, is said to depend on the maxim, *cujus est solum, ejus est usque ad cælum et ad inferos*. (*Crabbe's Law of Real Property*, § 445. *Mahan v. Brown*, 13 *Wend.* 263.) A man who erects a house on his own land is entitled to all the light and air that will come to him, from above. That which comes to him in a lateral direction, and which he secures through his windows, is an easement. It may pass over the land of others, who possess the same right to it, and who, by the erection of fences or buildings, may obstruct its passage. The question, therefore, often arises, under what limitation the right can be enjoyed.

In England, it is said that an action may be maintained for the obstruction of the plaintiff's ancient lights, and that evidence of an

uninterrupted use and enjoyment of the light for the space of twenty years will raise a *prima facie* presumption of a legal title to enjoy it. (2 *Starkie's Ev.* 538, 938. *Mahan v. Brown*, 13 *Wend.* 263.) But in a later case, in this state, this doctrine seems to have been qualified. The presumption of a right by grant or otherwise, as applied to the windows of one person overlooking the land of another, so that by an uninterrupted enjoyment for twenty years the owner acquires a right of action against his neighbor for stopping the lights by the erection of a building upon his own land, it was said, forms no part of our law. Such a law, the court thought, was not adapted to the circumstances or existing state of things in this country. The question of a presumptive right by grant or otherwise, although it may have been enjoyed for twenty years or more, without interruption, must be submitted to the jury; who should be told that they *may* presume a grant, if there be no evidence to repel the presumption. The court also held, that to authorize the presumption of a grant, the enjoyment of the easement must not only have been uninterrupted for the period of twenty years, but it must have been *adverse*—not by leave or favor—but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. (*Parker v. Foote*, 19 *Wend.* 309. *Banks v. American Tract Society*, 4 *Sand. Ch. R.* 464.)

As user affords evidence of a right, so non-user is evidence of a relinquishment.

If a person builds on his own land, and afterwards sells a lot adjoining his house, without restriction, to a third person, the latter may build so near as to obstruct the windows of his grantor. The grantor should have protected his own premises by a condition in his grant of the adjoining lot, or by a covenant not to obstruct his lights. Neither light, air or prospect can be the subject of a direct grant. They can only be secured by covenant, agreement or condition. (*Parker v. Foote*, *supra*, 316.)

If a man so constructs his house as to overlook the privacy of his neighbor's grounds, the latter has no remedy but to erect a wall or a fence upon his own land, so as to prevent the consequences. (2 *Starkie's Ev.* 938. *Mahan v. Brown*, *supra*.)

The same principle is applicable to the enjoyment of pure air. Hence the owner or occupier of a dwelling house has a right of action against one who shall, on his own land or otherwise, so poison the air as to render it unwholesome. What erections will amount

to a nuisance depends, in some manner, upon circumstances. In one case, the erection of a tallow furnace so near an innkeeper that his guests left him, in consequence of the stench, (*Mosley v. Pragnell*, *Cro. Car.* 510,) was held to be a nuisance. In another case the erection of a hog house and putting hogs therein, so that by reason of the fetid smells the plaintiff and his family could not remain in his house, was in like manner held to be a nuisance. (*Aldred's case*, 9 *Co.* 58.) In both the above cases an action was held to lie. (*See note to Aldred's case, supra, where most of the cases are collected and examined.*)

The right to running water on a man's own land is as perfect as his right to the land itself. No one has a right to divert it from its natural course without the consent of the owner of the land, or to corrupt it so as to render it unfit for use. (*Gardner v. Trustees of Newburgh*, 2 *John.* 162. *Carhart v. The Auburn Gas Light Co.* 22 *Barb.* 297.) Nor will he be permitted *maliciously* to diminish the water which penetrates through the ground into his neighbor's well; though he may dig a well on his own land, if it be necessary, and is not responsible to his neighbor, if thereby the quantity of water which would otherwise penetrate into his neighbor's well, be lessened. (*Greenleaf v. Francis*, 18 *Pick* 117. *Beach v. Driscoll*, 20 *Conn. Rep.* 542.) But a man has a right to the free and absolute use of his own land, so long as he does not directly invade that of his neighbor. (*Ellis v. Duncan*, 21 *Barb.* 230.)

The riparian owners, *prima facie*, own to the thread of the stream, if it be above the ebb and flow of the tide; and if it be in fact navigable, are entitled to the enjoyment of it subject to the public use of it as a highway, and to compensation for the diversion of its waters to public use to the injury of their mills. (*The People v. The Canal Appraisers*, 17 *Wend.* 572, reversing previous cases, 13 *id.* 355. *Walton v. Tefft*, 14 *id.* 216.)

Hence if a grant of land be made as *along the river*, or *by the river*, or *upon the margin of the river*, or *to the banks of the river*, or *along a highway*, or *upon a highway*, or *to a highway*, such grant carries the premises in the one case to the center of the river, and in the other to the center of the highway. (*Walton v. Tefft, supra.* *Per Walworth, in Canal Com. v. The People*, 5 *Wend.* 443. *Same v. Kempshall*, 26 *id.* 404. *Child v. Starr*, 4 *Hill*, 369, 373.

Varick v. Smith, 9 Paige, 547. *Ex parte Jenings*, 6 Cowen, 518. 5 Co. Rep. 106.)

It is competent for the parties, by the terms of the grant, in the one case to exclude the river, and in the other to exclude the highway; but unless they are in terms, or by necessary implication, excluded, the grantee will take to the center of the stream in the one case, and to the center of the highway in the other. (*Luce v. Carley*, 24 Wend. 451. *Child v. Starr*, 4 Hill, 369. *S. C.* 5 Denio, 599. *Jackson v. Hathaway*, 15 John. 454. *Dovaston v. Payne*, 2 *Smith's Lead. Cas. by Hare & Wallace*, 192, 193. *Angell on Water Courses*, 21 to 41.)

When hydraulic works are erected on opposite banks of a stream, if there is not sufficient water for a full supply of all, the owner on each side is entitled to an equal share of the water, or so much of it as is necessary for his mills, if less than a moiety is sufficient. If the owner of the mills, on either side, has been in the quiet enjoyment of the water privilege, and the other attempts to deprive him of it, and thus destroy his mills, a preliminary injunction is the proper remedy. (*Arthur v. Case*, 1 Paige, 447; *affirmed*, *Case v. Haight*, 3 Wend. 632.)

The owner of the soil on a public river has a right to erect a mill on his land. But he must construct his dam and use the water so as not to injure his neighbor below, in the enjoyment of the same water, according to its natural course; and if he so diverts the water as to injure the mill of another, he is liable to damages to the amount of the injury sustained. (*Sackrider v. Beers*, 10 John. 241. *Van Bergen v. Van Bergen*, 2 John. Ch. 272.)

The erection of a dam upon a stream does not confer an exclusive right to the use of the water, by an occupancy short of the time sufficient to raise the presumption of a grant. A person may therefore lawfully erect a mill and dam on the stream above, though the water be thereby in part diverted. (*Platt v. Johnson*, 15 John. 213.)

In case there be several owners of mill seats on a stream, each having a common right to its use, neither can maintain an action against the other for the reasonable use of it. But if the one above stops the natural flow of the water, so as to destroy the mill below or render it useless; if he shuts down his gate, and detains the water for an unreasonable time, or raises his gate and lets out the water in such a way as to prevent the owner of the mill below from using it, or deprives him of a reasonable and fair participation in

the benefit of the stream, he is liable to damages to the extent of the loss. (*Merritt v. Brinkerhoff*, 17 *John*. 306.) The principle is that each must so use his own right as not unnecessarily to impair the right of his neighbor.

The exclusive enjoyment of water in a particular way for twenty years, without interruption, is sufficient to raise a presumption of title; and it is not necessary that the water should have been used in the same precise manner during the twenty years, or that it should have been used to propel the same machinery. (*Belknap v. Trimble*, 3 *Paige*, 577. *Smith v. Adams*, 6 *id.* 435. *Baldwin v. Calkins*, 10 *Wend.* 167.)

In case there be a spring of water on a man's land which flows naturally on to the land of another, the owner of the land where the spring is may use as much as is necessary for his family and cattle, but he cannot appropriate the whole of it to his own use for purposes of irrigation, if he thereby deprives his neighbor of a reasonable use of it. (*Arnold v. Foot*, 12 *Wend.* 330.)

The same principle with respect to a diversion of water courses applies to subterraneous streams, as well as to such as flow upon the surface. (*Smith v. Adams*, 6 *Paige*, 435.) The fact with respect to the diversion of a subterranean stream may be more difficult of proof, but when the fact is ascertained the same legal principles apply. (*Id.*)

All the property that a man can acquire in flowing water is a right to its use; the right is no greater though it passes wholly through his land. He may have a certain right of property in it; but the water itself is not his property. He has a right to its natural flow, and to use it for his cattle, or his household, or upon his water wheels. (*Marshall v. Peters*, 12 *How. Pr. Rep.* 222.) Land, says Sir Edward Coke, comprehends any soil, ground or earth, and all buildings upon it, and the water passing over it. An action is never brought to recover water, by that name, but is brought for so much land covered with water. (2 *Bl. Com.* 18.) The mode of granting the water of a running stream, is to convey so much land covered with water, and not the grant of the stream itself. (*Nosttrand v. Dunham*, 21 *Barb.* 478. *Jackson v. Halstead*, 5 *Cowen*, 216. *Co. Litt.* 4 a.)

The doctrine of dedication extends to streets, highways, public squares, burying grounds, and perhaps to other easements of a public concern. An examination of its principles frequently becomes necessary in the investigation of titles to land. Whether, though the fee be in the grantor, the public may not have acquired an easement in the same premises, is often an interesting and difficult question.

A dedication of land to public or pious uses is a solemn appropriation of it by the owner to such uses. It is a devoting of property for some proper object in such a manner as to conclude the owner. (*Per Beardsley, J. 6 Hill, 411.*) It may be either by an express grant to a person, or corporation capable of taking in trust for the public, or it may be implied from the acts of the owner.

In the case of *Stuyvesant v. The Mayor &c. of New York*, (11 *Paige, 414*,) the dedication was by an actual grant by the owner of the land to the corporation of the city, of certain lands for the purposes of a public square, upon condition that such lands should for ever be used and appropriated for the purpose of a public square exclusively, and upon the further condition that the corporation should immediately proceed to regulate the lands granted, and should inclose and improve the same in the manner specified in the conveyance thereof; and the corporation joined in such deed by executing it under its corporate seal, and covenanted to stand seised of the premises for that purpose exclusively, and that such corporation should abide by, observe and perform the conditions imposed upon it by the acceptance of such agreement and conveyance. This was held to be a valid dedication, obligatory upon the parties, and that the corporation was bound to perform the conditions specified in the conveyance.

The grant, in the foregoing case, having been upon condition that the grantees would proceed immediately to regulate the lands granted, and to inclose and improve them within a reasonable time, the grantor, it was held, had the right, at his election, either to waive the forfeiture and file his bill in equity to compel a specific performance of the covenants and to compensate him for the damages sustained by the neglect, or to insist upon the forfeiture, and repossess himself of the land, for a breach of the condition.

But a dedication in cases of this kind is more frequently *implied*, than by an *express* grant to the public or a corporation, in trust. It usually occurs where the owners of land in a city or village, with

a view to their own as well as the public advantage, lay it out into lots with streets and avenues intersecting the same, and sell the lots with reference to such streets and avenues. In cases of this kind the original grantor cannot afterwards deprive his grantee of the benefit of having such streets or avenues kept open. The same principle is applicable to a similar dedication of urban lands to be used as an open square or public walk. (*The Trustee of Watertown v. Cowen*, 4 *Paige*, 510.)

The subject was very fully discussed by the supreme court of the United States in the case of the *City of Cincinnati v. The Lessee of White*, (6 *Peters*, 431.) In that case the equitable owners of a tract of land, before they had perfected their title by a patent from the government, laid out a part of it into a town which now constitutes the site of the city of Cincinnati. Upon the plot of the town they laid out and designated a part of the land as a public common, or open square, for the use of the inhabitants of the town. This was held to be a sufficient dedication of the land to the public, to vest the title to this common or square in the city of Cincinnati; although the city was not incorporated until many years afterwards.

The surveying of land into building lots, by the owner, and selling them or any of them for that purpose, with reference to, and bounding them on streets therein designated, amounts to a dedication of the streets, and on their being opened by the public authorities he is entitled, as owner of the fee, to only a nominal compensation. The purchaser is presumed to pay an enhanced price for the anticipated easement, and, therefore, the original owner has no equitable claim to a remuneration from the public. (*Matter of Lewis Street*, 2 *Wend.* 472, *overruling* 4 *Cowen*, 452. *Livingston v. Mayor of New York*, 8 *Wend.* 55. *Wyman v. Same*, 11 *id.* 486. *Matter of Freeman Street*, 17 *id.* 661. *Matter of Thirty-Second Street*, 19 *id.* 128. *Matter of Twenty-Ninth Street*, 1 *Hill*, 189. *Matter of Thirty-Ninth Street*, *Id.* 191.)

And this is so whether the owner bounds his grantees on the *center of the street*, or on the *side of it*. (*Id.*) If the grant be bounded on the center of the street, such act alone, without an *user* by the public, is deemed a dedication of the land over which the street passes to the public use, so far forth that on the opening of the street, the purchaser is entitled only to a nominal sum as compensation for the fee. (*Matter of Thirty-Second Street*, *supra*.)

When a street is thus dedicated to the public, but before it has been accepted or recognized by the proper public officers as a public street, it has been doubted whether the grantee of a lot bounded on such a street may be considered as taking to the center of the street, so as to enable him to maintain an action against another for digging the street opposite to his lot and removing the earth therefrom, or whether he has merely an easement or right of way in the street. (*Willoughby v. Jenks*, 20 *Wend.* 96.) It would seem, on principle, that his title extends to the center of the street in such a case. (2 *Smith's Lead. Cas.* note 180 to 188, where the subject is fully discussed and many of the cases are ably reviewed.) Should the grantee be limited in terms to the exterior line of the street, the fee of the land in the street would remain in the original owner, subject to the easement of a way. In the absence of such express limitation, the cases before referred to under this head, carry the grantee to the center of the street.

After such dedication, if the title to the street remains in the original grantor, he cannot use it in a manner inconsistent with the dedication, and should he sell it to others, the purchaser would take the fee subject to the dedication. (*Wyman v. Mayor of New York*, 11 *Wend.* 486.)

But where lands are thus dedicated by the original owner to public use as a street, such street does not become a public highway until it is accepted as such by the public authorities. (*The City of Oswego v. The Oswego Canal Property*, 2 *Seld.* 257. *Clements v. The Village of West Troy*, 16 *Barb.* 251; *S. C.* 10 *How.* 199. *Bissell v. The New York Central Rail Road Co.* 26 *Barb.* 630.) If, however, the street be opened and used uninterruptedly for a period of twenty years or over, it affords evidence of acceptance, and it becomes a public street. (*Wiggins v. Talmadge*, 11 *Barb.* 457. *Gould v. Glass*, 19 *id.* 179, 195. 10 *How.* 199.) A user of twenty years or upwards is thus made equivalent to a laying out of the road by public authority, or an acceptance by the proper officers.

The same principle of acquiring a right to a street or a way by usage is extended to rivers. A usage for a period of twenty-five years for rafting boards and timber, though the river be not navigable in the common law sense of the term, and the fee of its bed is in the owners of the adjoining land, becomes a public highway, for

such purposes. The free use of the waters which can be made subservient to commerce, has, by the general consent of mankind, been considered as a thing of common right. Individuals who occupy the adjoining banks may use the waters for their own emolument, so far only as it can be done without any material interruption of the public use. (*Shaw v. Crawford*, 10 John. 236. *The People v. Platt*, 17 id. 195, 212.) But the doctrine of dedication does not extend to a right of landing and depositing manure &c. from a navigable stream upon adjoining land. (*Pearsall v. Post*, 20 Wend. 111, affirmed, 22 id. 425.) Nor to a private stream which can only be used for a short time in each year. (*Munson v. Hungerford*, 6 Barb. 265.)

The dedication of property is not confined to streets, public squares, and the like. It may be extended to pious and charitable objects; to churches, court houses, and other public buildings; to a spring of water for public use, and for a burying ground. (*McConnell v. The Trustees of Lexington*, 12 Wheat. 582. *Beaty v. Kurtz*, 2 Peters, 566. *State v. Trask*, 6 Vt. R. 351. *Hunter v. The Trustees of Sandy Hill*, 6 Hill, 407. *Potter v. Chapin*, 6 Paige, 639.)

“The law which governs such cases is anomalous. Under it rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedications is different. A dedication may be made without writing; by act *in pais*, as well as by deed. It is not at all necessary that the owner should part with the title which he has; for dedication has respect to the possession and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. The principle upon which the estoppel rests is, that it would be dishonest, immoral, or indecent, and in some instances even sacrilegious, to restrain at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious use. The law, therefore, will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed.” (*Per Beardsley, J. in Hunter v. Trustees of Sandy*

Hill, supra, 411, 412. *Cincinnati v. Lessee of White*, 6 *Peters*, 431, 438.)

The statute of frauds (2 *R. S.* 134, § 6,) does not make it necessary that a *dedication* of lands for public or pious uses should be by deed, or by an instrument in writing. It expressly excepts from that requirement such transfers of an interest in land as *are made by operation of law*.

PART II.

OF EQUITABLE ESTATES.

IN this part of our treatise we propose to pass under review the law with respect to uses, trusts, powers, marriage settlements and merger.

It embraces that branch of the law of real property, which was originally administered almost exclusively by courts of equity, and which, at the present day, requires the frequent interposition of equity to afford relief. As the doctrine of uses, trusts and powers, underwent radical changes in this state, at the revision of the statutes in 1830, and as these statutes were intended to supersede the former practice and laws of the state, it is deemed advisable that we should retain the same divisions of the subject.

Marriage settlements owe their origin, in a great measure, to the doctrine of uses and trusts, and derive their efficacy from the same source. They may, therefore, appropriately be treated under this head. And the law of merger has such a connection with both legal and equitable estates, that it may with great propriety be discussed in this place.

We shall treat of uses and trusts together in the first chapter, and the other subjects of this part, in successive chapters.

CHAPTER I.

OF USES AND TRUSTS.

It is impossible fully to comprehend the provisions of the revised statutes on the subject of uses and trusts, without some knowledge of the system which was previously in force, and which the new

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system was intended to supplant. The enactment is, that uses and trusts, except as authorized and modified by the same statute, are abolished ; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in the same chapter. (1 R. S. 727, § 45.)

It has sometimes been argued that questions growing out of the law of trusts should be treated as if the legislature had, in the first instance, annulled all trusts, and then proceeded to a new creation. This is an erroneous view of the subject. It is more correct, as was observed by Gardiner, J. in *Leggett v. Perkins*, (2 Comst. 307,) to say, that they abolished all that they have not recognized as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by the application of common law principles.

At common law, an use was neither *jus in re*, nor *ad rem* ; that is, neither an estate nor a demand. It was a trust reposed by any person in the terretenant, that he may suffer him to take the profits, and that he will perform his intent. It was, in short, an ownership in trust.

Although the *cestui que use* was generally in possession of the lands, yet he was considered by the courts of law as tenant at sufferance. When the court of chancery first assumed a jurisdiction in cases of uses, it went no further than to compel payment of the rents and profits to the *cestui que use*. In process of time it went a step further ; and established the rule that the *cestui que use* had a right to call on the feoffees to uses for a conveyance of the legal estate to himself, or to any other person whom he chose to appoint ; and also to defend the title to the land. The legal estate was vested in the feoffee to uses, who performed the feudal services ; who was deemed the tenant of the fee, which was liable to his incumbrance.

The right in conscience and equity to the rents and profits of the land, was not issuing out of the land, but was *collateral* thereto, and only annexed in *privity* to a particular estate in the land. It was created by a confidence in the original feoffee, and continued to be annexed to the same estate, as long as that confidence subsisted and the estate of the feoffee remained unaltered. So that to the execution of the use two things were necessary, namely, *confidence* in the person and *privity* of estate. (*Cruise's Dig. tit. 11, Use, ch. 1.*)

All private persons who were capable of taking lands by feoffment might be *seised to a use*, and were compellable in chancery to

execute it. All corporeal hereditaments and such incorporeal hereditaments as were *in esse*, as rents and the like, might be conveyed to a use. But it could not, like a feoffment, be created without a sufficient consideration. It was not an object of tenure. It was not *forfeitable* for the treason of the *cestui que use*; nor *extendible* for his debts. It was neither subject to dower or curtesy. It might be transferred by one to another by any species of *deed or writing*. A use might be *declared* to a person who was not a party to the deed by which it was raised, contrary to the rules of the common law, which allowed no one to take under a deed unless he was a party to it. The *cestui que use* in possession could alien the lands, and none of the technical words required in other conveyances were indispensable. He could create a fee simple without the word *heirs*. It could be created to take effect *in futuro*. A power of revocation of the use might be annexed to the instrument by which it was created. It might be so limited as to change from one person to *another*, upon the happening of a future event. It was devisable and descendible in the same manner as legal estates. (*Cruise's Dig. supra. Crabbe's Law of Real Property, 1065 et seq.*)

The inconvenience which was found to arise from uses, after other ineffectual efforts to remove them, led to the enactment of the 27th Hen. 8, ch. 10, commonly called the statute of uses, the object of which was entirely to abolish uses by destroying the estate of the feoffees to uses, and transferring it from them to the *cestui que use*, whereby the use would be turned into a legal estate. The consequence of which would be the *cestui que use* would become the complete owner of the estate as well in law as in equity. This statute, frequently spoken of as the statute for transferring uses into possession, was re-enacted in this state at an early period, and continued in force until 1830. (*Act of Feb. 20, 1787, 1 R. L. 72.*)

There were three things necessary to the execution of a use under the statute: 1. A person seised to the use of some other person; 2. A *cestui que use in esse*; and 3. A *use in esse* in possession, remainder or reversion. (*Chudleigh's case, 1 Co. 126 a, and notes.*)

The object of the legislature was entirely defeated by the narrow construction of the statute by the common law judges. The statute declared in substance that whenever any person is seised to the use of another, the person so entitled to the use, should also be entitled to the possession and legal estate. The judges decided according to the letter, overlooking the spirit of the law, and held that where

successive uses are contained in a conveyance, it is the first only, which in technical language is executed by the statute. Thus a grant to A. to the use of B. to the use of C. was held to vest the legal estate by force of the statute in B., while C. retained the beneficial ownership, in the same manner as if the statute had never been passed. In such cases, as was said by the revisers in their note to the statute which they proposed, the whole effect of the law was to change, not the estate but the trustee. Though the statute, under the construction given to it, did not accomplish all that was desired, it effected important and durable consequences in the law of real property. The statute did not abolish existing uses, nor prohibit the conveyance to uses in future. It only declared that both existing and future uses, as they arose, should become legal estates, and the effects were, among other things, to introduce new forms of conveyances, by which the title and possession of lands were transferred without livery of seisin, which at common law was indispensable, and new modifications of property, which the increasing wants of society demanded, but which the genius of the feudal system forbade. (*See Notes of Revisers, 3 R. S. 582, 2d ed.*)

The construction given by the courts of the common law to the statute of uses gave rise to the whole doctrine of trusts. The second use, which the courts held was not executed by the statute, was treated by courts of equity as a trust, and enforced by them as such. A trust, therefore, is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in courts of equity which were formerly applied to uses. (*Jackson v. Fleet, 14 Wend. 180, per Nelson, J. Fisher v. Fields, 10 John. 495-506.*)

It is needless to go into an examination of the doctrine of uses under the act of Henry 8, re-enacted here in 1787, any further than will be necessary to explain the existing state of the law. It is supposed that the legislature, in 1830, intended to accomplish what the British parliament failed to do in the reign of Henry 8, namely, to execute the last use; or in other words, they intended the entire abolition of uses, while they retained and improved, by new provisions, all the benefits which ever flowed from the system; such, for example, as relate to the simplicity of the conveyances to which the doctrine of uses gave rise, and the better mode of alienation of property than formerly prevailed.

The legislature retained trusts in a modified form, with various changes which it will be necessary to notice.

While the statute, already referred to, abolished uses and trusts, except as authorized and modified by it, it very properly declared that every estate then held as an use, executed under any former statute of the state, should be confirmed as a legal estate. (1 *R. S.* 15, § 46.)

By the 47th section it is enacted that every person who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions as his beneficial interest. Although a subsequent section (§ 49) requires that every disposition of lands, whether by deed or devise, thereafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other to the use of or in trust for such person; and if made to one or more persons to the use of, or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee; yet it has been held by the court of appeals, that in such a case, where the conveyance is made in terms to a trustee, who at the time of the conveyance, executed to the grantor a mortgage of the premises conveyed, to secure a part of the purchase money, that the person to whose use the conveyance was made took the legal and equitable title subject to the lien of the mortgage. The deed and mortgage are, in such a case, to be construed together, as though both were incorporated in the same instrument. (*Rawson v. Lampman*, 1 *Selden*, 452.)

The provisions of the revised statutes transmuting certain trusts into legal estates in the beneficiaries, as is done by § 47 above, apply only to express formal trusts, and have no application to constructive trusts, or such as are not expressly declared to be within the statute of frauds. The latter fall within the class of trusts of which courts of equity had the exclusive cognizance. (*Johnson v. Fleet*, 14 *Wend.* 181. 1 *Mad. Ch. Pr.* 446.) Where a party is converted into a trustee for the purpose of the remedy, as in the case of a purchaser of the trust property with notice, he is made liable on the ground of fraud, and can be reached only by an equitable action.

In all cases of mere passive trusts the revised statutes have vested the legal estate in the lands in the person or persons entitled to the

actual possession and to the whole beneficial interest in the lands under the trust. That was the obvious design of the 47th section, just referred to. (*Cushney v. Henry*, 4 Paige, 352.)

This is the same, whether the attempt to create the trust be by will or by grant. In *Knight v. Weatherwax*, (7 Paige, 182,) the testatrix devised certain lands to her daughters and their respective heirs, subject to the payment of certain sums of money for debts and legacies; and further directed that the lands should remain in the hands of her executors for the benefit of her daughters, during their respective lives, and then the remainder to be given up to their heirs; and made the three daughters her residuary devisees and legatees; it was held that the executors took no estate in the premises under the will; that estates for life were vested immediately in the three daughters, as tenants in common, subject to the payment of the debts and legacies, with a remainder in fee to such persons as should be the heirs of the several daughters at the time of their respective deaths. In this case, by the law as it stood before the revised statutes, the daughters, according to the rule in Shelley's case, would have taken an absolute estate in fee as tenants in common. But under the existing law, since the abrogation of that rule by the revised statutes, the limitation over of the remainders in fee, to the heirs of the daughters, is valid and vests such remainders in those who may be their heirs at the time of their respective deaths as purchasers. (1 R. S. 325, § 28. *Knight v. Weatherwax*, *supra*, page 185.)

In the case of *Hoxie v. Hoxie*, (5 Paige, 187,) the testator had devised his residuary estate to be equally divided among the children of his two brothers and his sister, when they should severally become of age; the question was whether the children of the brothers and sister *in esse* at the death of the testator, took immediate vested estates in possession, as tenants in common, or whether they took mere contingent interests by way of executory devise, in the residuary estate; depending upon the contingency of their arriving at the age of twenty-one respectively; and that in the mean time the legal estate descended to the heir at law of the testator. The chancellor held that the infant devisees took a vested estate, which, upon the death of the devisee under age, would have descended to his own children, or heirs at law, and not to the heirs of the testator. The estate, he observed, was not given to them, if they arrive at the age of twenty-one, but it was to be divided among them *when* they re-

spectively attain the age of twenty-one. He observed that where, from the will itself, it is evident that the testator meant that the heir at law, or any other person, should take the legal estate for the benefit of the real devisee, the court would consider the estate as devised in trust, although no formal words of devise to the trustee are used. But when it is clear that a person *in esse* and capable of taking the legal estate, at the time of making the will, was intended to have the whole beneficial interest in the estate during his minority, as well as afterwards, and there are no words in the will indicating an intention to give the legal estate in trust to another person for his use, he could see no good reason for giving the legal estate to the heir at law, as the trustee for the infant, instead of giving it to the infant himself, to be taken care of in the mean time by his legal guardian. The case was decided, in truth, upon the ground that by the 47th section of the act the devisees took a legal estate in the land of the same quality and duration as their beneficial interest in the property which the testator intended to give them by his will.

The sections of the statute we have been considering were not intended to extend to trusts arising or resulting by implication of law, nor to prevent or affect the creation of such express trusts as are thereafter authorized and defined, and which we shall soon proceed to examine. (1 *R. S.* 728, § 50.)

The doctrine of resulting trusts was well understood before the revised statutes. It occurred when a person purchased land with the money of another, and took the deed in his own name. In such a case a trust resulted in favor of the party to whom the money belonged. The trust was allowed to be proved by parol, and the evidence was admissible, not only against the face of the deed itself, but in opposition to the answer of the trustee denying the trust. If part only of the consideration was paid, the trust resulted *pro tanto*. (*Boyd v. McLean*, 1 *John. Ch.* 582. *Botsford v. Burr*, 2 *id.* 405. *Livingston v. Livingston*, *Id.* 537. *Mann v. Mann*, 1 *John. Ch.* 23. *Jackson v. Sternberg*, 1 *John. Cases*, 153. *Jackson v. Motsdorf*, 11 *John.* 91. *Same v. Mills*, 13 *id.* 463. *Same v. Morse*, 16 *id.* 197. *Reid v. Fitch*, 11 *Barb.* 399. *Lounsbury v. Purdy*, 16 *id.* 376.) The trust might be rebutted as well as proved by parol. (*Jackson v. Feller*, 2 *Wend.* 465.) And the estate of the *cestui que trust* could be sold under an execution issued upon a judgment against him. (*Foote v. Colvin*, 3 *John.* 216.)

The revised statutes have, to a considerable extent, changed the rule in these respects. The 51st section forbids that a use or trust shall result in favor of the person by whom the payment shall be made, in cases where a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another : but it enacts that the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions— 1st. That such conveyance shall be presumed fraudulent as against the creditors, *at that time*, of the person paying the consideration ; and 2d. When a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands. (*Id.* § 52.) 3d. That the provisions of the 51st section shall not extend to cases where the alienee named in the conveyance, shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration : or 4th. When such alienee, in violation of some trust, shall have purchased the lands so conveyed, with money belonging to another person. (§ 53.) Nor 5th, shall it be alleged or established to defeat or prejudice the title of a purchaser, for a valuable consideration, and without notice of such trust. (§ 54.)

The foregoing provisions have wrought out extensive changes in the law, with respect to resulting trusts, some of which we will mention.

1. The revised statutes have put an end to resulting trusts arising from the *voluntary* payment of the purchase money by one person, and taking the conveyance in the name of another, so far as relates to any trust in favor of the former. (*Bodine v. Edwards*, 10 *Paige*, 504. *Norton v. Stone*, 8 *id.* 222.)

2. Under the present statute we have seen, that no use or trust results in favor of him who paid the money, and that the title vests in the person named as alienee in the deed. But the conveyance is presumed to be fraudulent as against the creditors, *at that time*, of the person paying the consideration ; and if a fraudulent intent is not disproved, a trust results in favor of those creditors, to the extent which may be necessary to satisfy their just demands. It has been made a question whether the creditors can sell the land on execution. The supreme court, in *Wait v. Day*, (4 *Den.* 439,) thought they could so sell it. The chancellor, in *Brewster v. Power*, (10 *Paige*, 563,) thought otherwise. He was of opinion that the cred-

itor could only reach the interest of his debtor by bill in equity after exhausting his remedy at law by issuing an execution, and upon a return thereof unsatisfied obtaining an order to have the defendant's interest sold and applied to the satisfaction of the judgment. He thought the interest of the party was not bound by the docketing of any judgment or decree. ' This doctrine of the chancellor was approved by the court of appeals, in *Garfield v. Hatmaker*, (15 N. Y. Rep. 476,) and that of the supreme court, in *Wait v. Day*, so far as it holds to the contrary, overruled.

3. The statute by its own terms, creates the trust only in favor of those who were creditors at the time of paying the consideration of such purchase, and it would seem that subsequent creditors cannot avail themselves of it. (*Garfield v. Hatmaker, supra. Brewster v. Power*, 10 Paige, 562.)

The rule is otherwise with respect to fraudulent sales, not within the 51st and 52d sections. In those cases, subsequent as well as existing creditors may impeach them for fraud. (*Mead v. Gregg*, 12 Barb. 653. *Reade v. Livingston*, 3 John Ch. 481.)

To constitute such a resulting trust as may be established by parol proof, it is necessary that the consideration money for the purchase should belong to the *cestui que trust*, or should be advanced as a loan or gift to him. (*Getman v. Getman*, 1 Barb. Ch. 499.) Such trust must arise, if at all, at the time of the conveyance. It cannot arise from a subsequent application of the funds of a third person to pay the purchase money, or to the improvement of the property. (*Rogers v. Murray*, 3 Paige, 390.) Nor can it arise where there is an express trust, declared by the parties, and evidenced by a written declaration. (*Leggett v. Dubois*, 5 Paige, 114.) Nor in opposition to the express terms of the conveyance; as when, for example, it is absolute and with warranty. (*Squire v. Handy*, 1 Paige, 494. *Rathbun v. Rathbun*, 6 Barb. 98.)

While it was the policy of the revised statutes, as has been seen, to vest the estate at once in the party beneficially interested, there were obviously some cases of express trust, proper to be retained, and which could not be made effectual unless the legal estate should pass to the trustees. An assignment for the benefit of creditors would in general be defeated, if the title were left in the debtor; and a trust to secure the rents and profits of lands, and apply them to the education of a minor, or the separate use of a married woman,

or the support of persons laboring under disabilities, requires that the legal estate should be vested in the trustees. The legislature, therefore, accordingly provided that express trusts may be created, 1, to sell lands for the benefit of creditors; 2, to sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3, to secure the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed by law. (1 R. S. 728, § 55, as amended in 1830, ch. 320, § 10.)

As a certain class of express trusts was thus retained, it may be proper to inquire by what words such trust may be raised. Since a trust is now, what a use was formerly, it is believed that words by which a use could formerly be raised, or a trust created, will be sufficient for that purpose. The statute does not prescribe any particular form of words, or mode of expression; and therefore leaves us to gather the intent from the whole scope of the instrument. In *Fisher v. Fields*, (10 John. 495,) it was said by the judge delivering the prevailing opinion of the court, that no particular form of words is necessary to create a trust, the intent only being regarded by courts of equity. The words, "use," "trust," "confidence," were used in the former statute, and therefore if lands were conveyed to A. and his heirs, in *trust* for B. and his heirs, or in "confidence" that he and they shall take the profits, the legal estate was vested in B. by virtue of the statute. But other language, expressive of this intent, was equally efficacious. The words "to permit a party to take the rents and profits," &c. have been held to create a valid trust. (*Right v. Smith*, 12 East, 455.)

A trust estate is defined by Mr. Cruise, (*Dig. tit. 12, ch. 1*), to be a right in equity to take the rents and profits of land, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct; and to defend the title to the land. This is sufficient as a definition of a trust under the revised statutes, with the qualification that when the trust is for the benefit of persons laboring under disability, as infants, lunatics, &c. no direction can be made by the *cestui que trust*, except through the medium of a proper tribunal, having equity powers.

Although the revisers thought, in 1830, that the 55th section above quoted comprised all the cases in which it would be necessary that the title and possession should vest in the trustees, it was found, at an early day, that there were numerous cases, where a literal construction of the act would defeat the intention of parties, and work out great injustice to the public. It became necessary, therefore, by several enactments, in different successive years, to enlarge the power of trustees, and to extend the doctrine of trusts to cases not provided for by the revised statutes. Thus, by the act of May, 1840, it was enacted that real and personal property might be granted and conveyed to any incorporated college, or other literary incorporated institution in this state, to be held in trust for either of the following purposes: 1. To establish and maintain an observatory; 2. To found and maintain professorships and scholarships; 3. To provide and keep in repair a place for the burial of the dead; 4. Or for any other specific purposes comprehended in the general objects authorized by their respective charters. These trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustees, and all property which shall hereafter be granted to any incorporated college, or other literary incorporated institution, in trust for either of the aforesaid purposes, may be held by such college or institution, upon such trusts, and subject to such conditions and visitations as may be prescribed and agreed to as aforesaid. (*Laws of 1840, ch. 318, § 1. 3 R. S. 16, 5th ed.*)

By the 2d section of the same statute, real and personal property may be granted to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purpose of military parades and exercise, or health, or recreation, within or near such incorporated city or village, upon such condition as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation, may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

By the 3d section of the same act, real and personal estate may be granted to superintendents of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such

district. These trusts were, by the 4th section of the same statute, allowed to continue for such time as may be necessary to accomplish the purposes for which they may be created. (*L. of 1840, ch. 318, § 4. 3 R. S. 16, 17, 5th ed.*)

The foregoing statute applied only in terms to property "*granted and conveyed*," thus leaving it doubtful whether the same trusts could be upheld if created by a last will and testament. This doubt was removed the following year, by the act of May 26, which declared that devises and bequests of real and personal property in trust, for any of the purposes for which such trusts are authorized under the act authorizing certain trusts, passed May 14, 1840, the act above mentioned, and to such trustees as are therein authorized, shall be valid in like manner as if such property had been granted and conveyed according to the provisions of the aforesaid act. (*3 R. S. 17, 5th ed.*)

By the act of 1846, the income arising from any real or personal property granted or conveyed, decreed or bequeathed in trust to any incorporated literary institution, for any of the purposes specified in the act authorizing certain trusts, passed May 14, 1840, or for the purpose of providing for the support of any teacher in a grammar school, or institute, may be permitted to accumulate till the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect either of the purposes aforesaid, designated in said trust. (*3 R. S. 17, 5th ed.*)

In 1855, the act of 1840 was further amended so as to provide, in case of the diminution of the trust fund, by making it good by the accumulation of interest and income; but in no case is the accumulation allowed to increase the trust fund beyond the true amount or value thereof, actually received by the trustees, to be estimated after the deduction of all liens and incumbrances on such trust fund, and of all expenses incurred or paid by the trustees in the collection or obtaining the possession of the same. (*3 R. S. 17, 5th ed.*)

Some doubts had been entertained as to the power of a receiver appointed by order of the court of chancery, and which power is now vested in the supreme court. To remove these doubts, and to provide for a few other cases, it was enacted in 1845, that any receiver appointed by virtue of an order or decree of the court of chancery, might take and hold real estate, upon such trusts and for such purposes as the court might direct, subject to its further order. (*L. of 1845, ch. 112, p. 90.*) Under this law, the chancellor held, in *Wilson*

v. *Wilson*, (1 *Barb. Ch.* 592,) decided in 1846, that the act was not broad enough to have the effect to transfer the title of real estate to a receiver, *by mere order of the court*, without an actual conveyance from the party to the suit in which the legal title was vested. But the court of appeals, in 1853, in the case of *Porter v. Williams*, (5 *Selden*, 142,) held, that after the adoption of the code of procedure, the language of which is broader than the act of 1845, (*supra*,) the title of the real as well as personal estate is vested in the receiver, by virtue of the order of the court, and that no conveyance of the debtor is necessary. The case of *Chautauque Bank v. Risley*, (19 *N. Y. Rep.* 370,) though decided in 1853, arose under the law prior to the adoption of the code.

In addition to the foregoing, there are several acts upholding trusts, to a certain extent, in favor of the United Society of the people commonly called Shakers, and in favor of the religious society of Friends, and in favor of the community of True Inspiration. (*See these acts collected*, 3 *R. S.* 18, 19, 5th ed.)

It is believed that the revised statutes do not affect the trusts authorized by the act to provide for the incorporation of religious societies originally passed in 1784, and revised in 1813. (*See same and the amendatory acts*, 3 *R. S.* 292 *et seq.*)

Most of the religious denominations in this state availed themselves of the general law, or applied to the legislature for special acts of incorporation; and the greatest part of the estate, real and personal, belonging to the different religious societies in this state, is held in trust by such corporations. The Roman Catholic denomination is an exception to this remark. They claimed to have the property belonging to their churches vested in their bishops in trust for the use of their religious societies. This claim was strongly resisted in some quarters, and strenuously urged in others. The controversy led to the act of 1855, commonly known as the church property law. (*L. of 1855, ch.* 230. 3 *R. S.* 19, 5th ed.)

Although the revised statutes do not authorize trusts of that kind, it was deemed expedient to forbid the creation of them in explicit terms. It was, moreover, believed to be for the interest of the public, that the tenure by which property was held by the various christian denominations for religious and pious uses, should be substantially the same. The statute accordingly provides, that no grant, conveyance, devise or lease of real or personal estate, nor any trust

of such property for the benefit of any person or his successor in any ecclesiastical office, shall vest any estate or interest in such person or his successor. And no such grant, conveyance, devise or lease, to or for any such person, by the designation of any such office, shall vest any estate or interest in any successor of such person. The statute does not recognize the validity of any such grant, conveyance, devise or lease heretofore made.

The second section forbids the future grant, conveyance, devise or lease of any real estate consecrated, dedicated or appropriated, or intended to be consecrated, dedicated or appropriated, to the purpose of religious worship for the use of any congregation or society, unless the same be made to a corporation organized according to the provisions of the laws of this state under the act entitled "An act for the incorporation of religious societies," and the acts amending the same, or under the act entitled "An act for the incorporation of societies to establish free churches," passed April 18, 1854. Such real estate which has been heretofore granted, devised or demised to any person or persons in any ecclesiastical office or orders, by the designation of such office or orders or other use, is declared to be held in trust for the benefit of the congregation or society using the same, and unless previously conveyed to a corporation as provided in the act, shall, upon the death of the person in whom the legal title is vested, vest in the religious corporation formed by the congregation or religious society occupying or enjoying such real estate, provided such corporation shall be formed under the laws of this state, and be in existence at the time of the death of such person; (§ 33;) and in case no such corporation shall have been formed, it shall vest in the people of this state in the same manner as if the person holding the legal title had died intestate and without heirs capable of inheriting such estate. Whenever the title so vests in the people it is placed under the control of the commissioners of the land office, who are required to convey it to a legal corporation, when one shall be formed by the society for whose benefit the estate was originally held. These enactments hold out strong inducements to religious societies to cause themselves to be incorporated. They are general in their nature; not aimed at any one denomination in particular, but embracing all who fall within the purview of the act.

The revised statutes with respect to uses and trusts have nothing to do with personal property. The whole scope and object of the provisions have reference only to real estate, or its rents and profits. (*Kane v. Gott*, 24 *Wend.* 661, *per Cowen, J.*) It is this class of trusts which alone falls within the scope of this work. Such trusts can be created only by an instrument in writing, duly executed within the statute of frauds. They may be created by a devise, or by a grant or deed. It is otherwise with respect to trusts in personal estate. Although they may be created by a last will or testament or other writing, they may also arise by parol. A formal, or even a written agreement, is not necessary to create a trust in money or personal estate. Any declaration, however informal, evincing the intention with sufficient clearness, will have that effect. The doctrine of equity is that admissions or declarations, by their own force, impress the fund with a peculiar character, and hence they are receivable on the same grounds as a precise and formal agreement. (*Day v. Betts*, 18 *N. Y. R.* 453, *per Comstock, J.*)

We have already seen by what words trusts may be created; and it may here be added that they may be created by a last will and testament, or by a deed or grant.

There is a distinction between a trust to sell created by deed, and a similar trust created by devise. In the first case, it is essential that the trustee should take the estate, or the trust itself may be defeated; but in the latter, no such necessity exists. The instance before given of an assignment for the benefit of creditors is a sufficient illustration of the rule. But the reason does not hold good, where land is devised to executors or other trustees, to be sold or mortgaged, when the trustees are not also empowered to receive the rents and profits. It is accordingly enacted that in such a case, no estate is vested in the trustees. But the trust is valid as a power, and the lands descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power. (1 *R. S.* 729, § 56.) The reason for this change of the law has been said to be, to take from the trustee the power to defeat the object of the trust, when such object can be as well accomplished under a trust power. (*Brown v. Wilber*, 8 *Wend.* 661, *per Nelson, J.*) On the death of the testator the power attaches immediately to the land, and no subsequent disposition can be made, nor incumbrance created, by which its execution can be defeated. (3 *R. S.* 585, 2d ed. *Rev.*

notes.) There is a difference between a naked authority, and a power coupled with an interest. (*Co. Lit.* 113, *a.*)

In the exigencies of society, there are numerous cases in which it is necessary that a trust should be created for the education and support, or for either of them, in such a manner that the provision cannot be anticipated, or aliened by the person beneficially interested. This will happen when a provision is desired to be made for an improvident offspring, or for a feme covert. Previous to the adoption of the revised statutes a trustee might hold the mere naked legal estate in real property, for a feme covert, while the whole equitable interest and estate therein was in her, and subject to her control. In relation, therefore, to such an estate, she was considered as a feme sole, and could charge her equitable interest in the property with any debt she might think proper to contract on the credit of it, which was not inconsistent with the trust or with the nature of her interest in the premises, and which was authorized by the instrument or conveyance creating the trust. All such mere formal trusts are now abolished; and in the few trusts which are authorized by the revised statutes, the whole estate, both legal and equitable, is vested in the trustee. The person for whose benefit the trust is created takes no estate or interest in the lands; but may enforce the performance of the trust in equity. (1 *R. S.* 729, §§ 57, 60. *L'Amoreux v. Van Rensselaer*, 1 *Barb. Ch.* 37. *Degraw v. Classon*, 11 *Paige*, 140. *Noyes v. Blakman*, 2 *Seld.* 567. *Calkins v. Long*, 22 *Barb.* 97. *Darling v. Rogers*, 22 *Wend.* 483.)

The beneficent object of the party creating the trust is thus prevented from being defeated by the improvidence or want of judgment and discretion of the beneficiary. Still it is obvious that the trust created to secure the rents and profits of lands where there is no valid discretion for the accumulation, should, with respect to the surplus of such rents and profits beyond the sum necessary for the education and support of the person for whose benefit the trust was created, be available to the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution. Such provision is made of the surplus for the benefit of creditors by the 57th section of the act. (*Degraw v. Classon*, *supra*.)

When a trust has thus been created for the receipt of the rents and profits of lands, the person beneficially interested cannot assign, or in any manner dispose of such interest; but the rights and interests of every person for whose benefit a trust for the payment of a

sum in gross is created, are assignable. (1 R. S. 730, § 63. *Hallett v. Thompson*, 5 Paige, 586. *Gott v. Cook*, 7 Paige, 521.)

When an express trust is created for any purpose not enumerated in the preceding sections, it is provided by the 58th section, that no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions, in relation to such powers, contained in the article on powers, of which we shall treat in the next chapter. Whenever the trust is valid as a power, the lands to which the trust relates remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power. (1 R. S. 721, §§ 58, 59. *Germond v. Jones*, 2 Hill, 570, 573.)

There are various provisions in the chapter on trusts which are merely declaratory of the then existing laws. Thus, the provision that when the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust, shall be absolutely void, (1 R. S. 730, § 65,) is no more than the familiar principle, that a party who derives a title under an instrument in writing, is chargeable with notice of its contents; and that no man can be protected as a *bona fide* purchaser, who acts with a full knowledge of the infirmities of his grantor's title. (*Sanford v. Handy*, 23 Wend. 267. *North River Bank v. Aymar*, 3 Hill, 262; approved in *Farm. and M. Bank of Kent Co. v. Butchers and Drovers' Bank*, 2 Smith, 143, notwithstanding its reversal by the late court of errors.) Nor is the provision that when the purposes for which an express trust was created, shall have ceased, the estate of the trustees also shall cease, introductory of any new rule. (1 R. S. 730, § 67.) It was part of the then existing law. (*Parks v. Parks*, 9 Paige, 107. *Legget v. Perkins*, 2 Comstock, 297.)

The same principle applies when the purchaser has notice of the object of the trust, although it be not named in the instrument, as when it is plainly expressed. The revised statutes provide that such instrument shall be deemed absolute as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice and for a valuable consideration. (1 R. S. 730, § 64.) This provision is only in affirmation of the then existing law. (*Fisher v. Fields*, 10 John. 495. *Murray v. Ballou*, 1 John. Ch. 566. *Shepherd v. McEvers*, 4 id. 136.)

The object of this provision is to prevent *secret trusts*, which have often been made use of as instruments of fraud.

It has always been esteemed to be unjust, when a party actually and in good faith pays a sum of money to a trustee, which the trustee as such is authorized to receive, that he should be held responsible for the proper application of such money according to the trust. The statute recognizes the hardship of such a rule, and it prevents the right and title derived from such trustee, in consideration of such payment, from being impeached or called in question, in consequence of any misapplication by the trustee of the money so paid. (1 R. S. 730, § 66.)

Formerly, upon the death of a sole surviving trustee of an express trust, the trust estate descended to his heirs at law, or passed to his personal representatives. These might be persons unknown to the party by whom the trust was created, and entirely unfit for the office. The trust property, moreover, was exposed to become mingled with the individual estate of the trustee, or to pass into the hands of his alienee. The rule itself has been abolished by the revised statutes. (1 R. S. 730, § 68.) In such a case, on the death of the trustee, leaving the trust unexecuted, it vests in the supreme court, with all the powers and duties of the original trustee, who will require it to be executed by some person appointed for that purpose, under the direction of the court. (*Matter of Van Schoonhoven*, 5 Paige, 559. *Hawley v. Ross*, 7 id. 103. *De Peyster v. Ferris*, 11 id. 13.) Equity permits no trust to fail for the want of a trustee.

With regard to active trusts, authorized by the 55th section of the act, it has been held that the rule is the same as at common law, that the trustee takes that quantity of interest only which the purposes of the trust require, and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled. (*Per Jewett, J. in Nicoll v. Walworth*, 4 Denio, 388. *Doe v. Nichols*, 1 Barn. & Cres. 336. *Doe v Simpson*, 5 East, 162.)

The common law made no provision for the *resignation* of a trustee, without the consent of all the persons interested in the execution of it. (*In the matter of Stevenson*, 3 Paige, 420. *In the matter of Van Wyck*, 1 Barb. Ch. 565.) The revised statutes introduced the provision that the court of chancery, now the supreme court, may, upon the petition of any trustee, discharge him from the trust, under such

regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require. (1 R. S. 730, § 69.)

The court had power, independently of the statute, to remove a trustee for good cause shown, and to substitute another in his place. (*The People v. Norton*, 5 *Selden*, 176.) The revised statutes have wisely regulated this power. They enact, that upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established by the court, the supreme court may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who for any other cause shall be deemed an unsuitable person to execute the trust. The court is also empowered, in such a case, to appoint a new trustee in the place of the one resigned or removed; and when, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its own officers, under its direction. These provisions extend only to cases of express trusts. (1 R. S. 730, 731, §§ 70-72.) And it has been held also that they do not embrace the case of executors *as such*, so far as relates to their power to sue for and collect debts due to the testator; or as relates to their liability to creditors, legatees and next of kin, on account of the personal estate which may have come to their hands. But when the duties which belong to them as executors have been discharged, and the division of the estate made, it was said that the court of chancery, now the supreme court, had the power to accept the resignation of one of such executors to whom a trust fund consisting of personal estate and the proceeds of the real estate, was devised, and to appoint another in his place, as one of the trustees to hold its funds set apart for the legatees of the testator. (*In the matter of Van Wyck*, *supra*.)

There have been some decisions of the courts on the subject of the resignation of trustees. It has been held that a provision in a will for the appointment of new trustees in case the number should be reduced by death, removal from the United States, or otherwise, does not authorize a trustee to resign. (*Cruger v. Halliday*, 11 *Paige*, 314.) It was even doubted in the last case, whether the concurrence of every person interested in the execution of the trust, would render the resignation valid, without an order or decree of the court.

A resignation will not be accepted without good cause shown for it. If the trustees have accepted the trusts, and especially if they have accepted a legacy given upon condition of their executing the trust, the court will not discharge them, on their own motion, unless good and sufficient reasons be shown. (*Craig v. Craig*, 3 Barb. Ch. 76.)

The acceptance of a *resignation* of a trustee, and his *removal* from office by the court, depend on different principles. The first does not imply any delinquency in the trustee; but the last does. This delinquency may have reference to the character or habits of the trustee personally, or his conduct towards the estate. If he *refuses* to execute a trust for the benefit of creditors, it is a good ground to remove him on the application of the latter. (*Matter of the Mechanics' Bank*, 2 Barb. 446.) Or it would be proper to order him to do the act imposed upon him by his duty.

A trust estate, it has been already said, will cease when the purposes for which it was created have ceased. (1 R. S. 730, § 67. *Sterriker v. Dickinson*, 9 Barb. 516.)

It will cease when the legal and equitable estates in land, being co-extensive, unite in the same person. The former, in such a case, is extinguished in the latter. (*Nicholson v. Halsey*, 1 John. Ch. 417.) There are some exceptions to the rule. Both the rule and the exceptions more frequently are exemplified in the case of mortgage securities than in any other cases. If the situation of the estate, or the interest of the mortgagee, requires that the lien of the legal estate should be kept distinct, or if the mortgagee by reason of some disability is unable to elect, or if there be a decisive intention of the mortgagee to keep them separate, a court of equity will prevent a merger, and preserve the estates distinct. (*James v. Johnson*, 6 John. Ch. 417. *James v. Mowry*, 2 Cowen, 246. *Russell v. Austin*, 1 Paige, 192. *Cleft v. White*, 2 Kern. 519, reversing previous report, 15 Barb. 70.)

At common law there was no stated or fixed period as to the bringing of actions. Limitations are created by, and derive their authority from, the statute. (*The People v. Gilbert*, 18 John. 228. *Wilcox v. Fitch*, 20 id. 472.) Until the revision of 1830, (2 R. S. 395, § 28,) the statute of limitations did not affect the government, nor was there any presumption of payment of demands due to the people, in analogy to the statute. (*Fairbanks v. Wood*, 17 Wendell, 329.)

Formerly there was no legal bar to an action for a legacy, yet the courts in regard to very stale demands, adopted the provisions of the statute, in the exercise of their discretion. (*Arden v. Arden*, 1 *John Ch.* 313.) No lapse of time is a bar to a direct trust, as between trustee and *cestui que trust*. (*Decouche v. Savetier*, 3 *John Ch.* 190. *Goodrich v. Pendleton*, *Id.* 384, 390.) In *Souzer v. De Meyer*, (2 *Paige*, 577,) decided in 1831, Chancellor Walworth held that the statute of limitations was a bar to a legacy, unless it was charged on land. He put it upon the ground that courts of law have concurrent jurisdiction with courts of equity to recover such legacies. When there is a concurrent remedy at law, the court thought that time was as absolute a bar to discovery or relief in equity, as it would be in a suit at law. (*Humbert v. Trinity Church*; 24 *Wend.* 587, *affirmed* 7 *Paige*, 195.)

Since the foregoing decisions were made, the court of chancery has been abolished, and the jurisdiction in matters of equity vested in the same tribunal which takes the cognizance of actions at law. The reasons on which some of those cases are based now fail altogether. In addition to this, the statute of limitations has undergone great changes. It is now incorporated in the code of procedure. In an action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the action must now be brought within six years, but the time is computed from the discovery, by the aggrieved party, of the facts constituting the fraud. (*Code*, § 91, *sub.* 6.) But there seems to be no limitation in the code, to a *direct trust*, as between trustee and *cestui que trust*; thus leaving that class of cases to the doctrine as it existed at common law.

CHAPTER II.

OF POWERS.

Powers are of two sorts: first, such as owe their origin to the statute of uses, and which are now defined and regulated by the revised statutes; and secondly, such as existed at common law, being simply powers of attorney, to convey lands in the name and for the benefit of the owner. We shall treat of both these kinds of power, in their order.

SECTION I.

Of Powers under the Statute.

The revisers, in their note to the article on this subject, remark that the law of powers is the most intricate labyrinth in our jurisprudence. To make the doctrine familiar to the capacity of men of common understanding, they began by proposing to abolish powers as they existed at that time, and prior and after that time, (1830,) they proposed that the creation, construction and execution of powers should be governed by the provisions of that article. It was so enacted by the legislature. (1 *R. S.* 732, §§ 93, 94.)

By the rules of the common law a fee simple could not be limited upon or after a fee, nor could a condition be reserved to a stranger. These difficulties were overcome by means of the statute of uses. We have seen that the law with respect to the first has been changed in this state by the act relative to the creation and division of estates. (1 *R. S.* 723, § 16.) Hence, independently of the doctrine of powers, a contingent remainder in fee may be created on a prior remainder in fee under certain restrictions. And with respect to the second, and also with respect to a power of revocation, the doctrine of powers has afforded the requisite relief.

The statute of New York is a brief epitome of the law of powers, as gathered from the systematic treatises on the subject, and the adjudged cases. No two authors entirely agree as to the division of the subject, nor in all their explanations. The legislature adopted that line of discussion of the matter, which seemed the most simple and congenial to our institutions. The simplicity of our modes of conveyance, and our habits and ways of business, have hitherto afforded few occasions for the application of the rules we are called upon to consider. .

Writers have not been entirely agreed in their definition of a power. It is defined by one to be an authority retained by, or conferred upon a person to deal with property, so as to affect, more or less, interests or estates therein possessed, either by himself or others, albeit it be underived therefrom. (*Wharton's Conveyancing*, p. 419.) Mr. Crabbe, in his treatise on the law of real property, says: a power, in the legal sense of the word, is an authority which enables one

person to do an act for another, and it is to be distinguished both from a trust and an interest. Powers, says he, are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted. Lord Eldon, in *Brown v. Higgs*, (8 Ves. 570,) in speaking of the distinction between trusts and powers, says: It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, a court of equity cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails, by the death of the trustee, or by accident, a court of equity will execute the trust. We have seen in the foregoing chapter that the same rule obtains here as to trusts. Equity never permits a trust to fail for the want of a trustee.

The definition of a power given by the revised statutes is substantially the same. It is defined to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or receiving such power might himself lawfully perform. (1 R. S. 732, § 74.)

The distinction between a trust and a power was exemplified in the case of *Tucker v. Tucker*, (1 Seld. 410.) The question arose under a will, the seventh clause of which was in these words: "I do authorize and empower my executors to exchange, sell and convey to and with adjoining owners or others, such gores, strips, or pieces of land as they may deem advantageous to my estate, by straightening and equalizing boundary lines, and to execute, deliver and receive sufficient deeds therefor." The question was whether the foregoing clause created a trust in the executors or was merely a power. If a trust, from its connection with other parts of the will it was shown to be void, in consequence of suspending the power of alienation for a longer time than the statute allows. It would be a trust, if it was necessary for the executors to take an estate by implication, in the lands of the testator, in order to effectuate his intention. But the court held that all the duties enjoined upon the executors by the will, in regard to the lands, could be discharged under the power, and that the clause in question merely created such power. It fell within the definition just given. The authority conferred upon the executors by the testator was to do some acts in relation to the lands, which the owner granting the power might himself lawfully do. (1 R. S. 732, § 74.)

In *Brewster v. Striker*, (2 Comst. 20,) the provisions of the will not only showed, in the opinion of the court, that the testator intended to give the entire and exclusive possession, charge and management of the real estate to the executors ; but by the clause that "the said real estate shall not, at any time hereafter, be sold or aliened, but by my said executors and the survivor of them," also intended to withhold from the grandchildren the power to sell, and thus prevent the alienation of the estate, or any incumbrance thereon, until the inheritance should finally vest in fee simple absolute, under the limitations in the will ;" and this could not be accomplished unless the title vested in the executors. . There was therefore a necessity for holding that a trust term vested in the executors by implication, and by thus holding the intention of the testator was effectual. This, then, was a trust and not a power.

So also, in *Dempsey v. Tyler*, (3 Duer, 74,) decided in 1854, it was held that during coverture the wife possesses no power to convey by deed to her husband, and is destitute of any testamentary capacity. Such power or capacity cannot be created over lands belonging to herself in fee, by virtue of any agreement made during coverture between herself and her husband. It can only be created or preserved, by an ante-nuptial agreement. Having power to grant or devise, while a feme covert, she may by such agreement reserve a power, by the due execution of which she may make a valid will in favor of her husband. The instruments under which the case arose, were all executed prior to 1848, and it was not supposed that the laws of 1848 and 1849, relative to the estates of married women, affected it in the least. (*L. of 1848*, p. 307. *L. of 1849*, p. 528.)

By the last mentioned statute, in connection with the act of 1860, chapter 90, a married woman has the same control and power of disposition during coverture over her estate real and personal, as if she was a feme sole.

It is quite obvious that no person is capable of granting a power, who is not at the same time capable of aliening some interest in the lands to which the power relates. (1 R. S. 732, § 75.) This is a truism, the force of which is not increased by a legislative enactment. That a party must have something himself, before he can bestow it upon others, is quite manifest. (*Selden v. Vermilyea*, 3 Comst. 536.)

Having shown the difference between a power and a trust, it remains to point out the distinction between *naked* powers, and powers coupled with an interest. A naked power does not, at common

law, survive. (*Osgood v. Franklin*, 2 *John. Ch.* 1; *affirmed*, 14 *John.* 527.) But a power to sell coupled with an interest, and accompanied by possession, survives the person creating it. (*Knapp v. Alvord*, 10 *Paige*, 205.) A power to a mortgagee, to sell on default of payment, is coupled with an interest, and survives the mortgage; (*Bergen v. Bennett*, 1 *Caines' Cas.* 1;) and it may be executed here by an administrator of the mortgagee, duly appointed in another state. (*Doolittle v. Lewis*, 7 *John. Ch. R.* 45.)

The powers authorized by the revised statutes are *general* or *special*, and *beneficial* or *in trust*. The statute defines them as follows: a power is general, when it authorizes the alienation in fee by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever. A power is special, 1st, where the persons or class of persons to whom the disposition of the lands under the power to be made, are designated; 2d, where the power authorizes the alienation by means of a conveyance, will or charge of a particular estate or interest less than a fee. A general or special power is beneficial when no power other than the grantee has by the terms of its creation, any interest in its execution. (1 *R. S.* 732, §§ 76 to 79.)

The revised statutes use the term "grantor of a power," as designating the person by whom a power is created, whether by grant or devise; and the term "grantee of a power," as designating the person in whom a power is vested, whether by grant, devise or reservation. (*Id.* § 135.)

The English books make a different distribution of the subject. They denominate the person possessing the property as the "donee" of the power, and they divide them into, 1. Restraining powers; and 2. Enabling powers. The first is where the owner of the estate conveys it to trustees, reserving a power to himself, under particular circumstances and certain restrictions, to revoke, alter, enlarge or diminish the trusts declared therein; and the second confers upon persons, not seised of the fee, the right of creating interests out of it, which could not be done by the particular tenant or donee, unless by virtue of such delegated authority. It is called an enabling power, because it gives a right to create interests which are to take effect out of estates vested in other persons. Both these kinds of powers were, either 1. Appendant or appurtenant; 2. Collateral or in gross; or 3. Simply collateral, which are either first, general, or second, special. (*Wharton's Convey.* 424, 425. *Crabbe's Law of Real*

Prop. 446.) The revisers, in their note, say that they propose a new division of powers. And the legislature concurring with them, adopted the classification which we have already noticed. This brief reference to a different mode of classification was necessary in order to understand the cases which may occasionally allude to the former terms.

With regard to the mode of creating a power, it may be observed that no formal words are necessary. The party creating it may indicate his intention in any language that he chooses to adopt. Still, as language is the instrument by which ideas are communicated, it is desirable that a power should be reserved or created by such words as clearly express the intention. In the statute on this subject, it is enacted that a power may be granted by a suitable clause contained in a conveyance of some estate in the lands to which the power relates, or by a devise contained in a last will and testament. (1 *R. S.* 735, § 106.) In *Dorland v. Dorland*, (2 *Barb.* 80,) the supreme court held that no formal set of words was requisite to create or reserve a power. It is sufficient if the intention be clearly declared. The language of the testator is to be construed equitably and liberally in furtherance of the intention. (*Jackson v. Verder*, 11 *John.* 169. *Hawkins v. Kemp*, 3 *East*, 441. *Right v. Thomas*, 3 *Burr.* 1441.) A devise of land "to be sold by" executors, without words giving the estate to them, confers a bare power only on the executors. (*Wharton's Convey.* 429. 1 *Sug. on Powers*, 132-134.)

The intention of the testator is much regarded in the construction of powers to sell, created by the will, and they are construed with greater or less latitude in reference to that intent. (*Osgood v. Franklin*, 2 *John. Ch.* 1.) Courts of equity look to the end and design of the parties, in considering the extent of the powers, and to a substantial, rather than a literal execution of the power. On this principle, a power limited in terms has, in favor of the intention been deemed a general power; and a general power in terms, has been cut down to a particular purpose. (*Wilson v. Troup*, 7 *John. Ch.* 25.)

In the same case it was said that a power to mortgage includes in it a power to authorize the mortgagee to sell in default of payment, because the power to sell is one of the customary and lawful remedies of the mortgagee, and has repeatedly been and is regulated by statute. (*S. C. affirmed*, 2 *Cowen*, 195.)

But a power to sell, and on such sale "to execute, seal and deliver.

in the name of the principal, such conveyances and assurances in the law of the premises to the purchaser in fee as should be needful or necessary according to the judgment of the attorney," does not authorize the latter to execute a deed with covenants, so as to bind the principal. (*Nixon v. Hyserott*, 5 *John*. 58.) Nor does a power to bargain and sell land confer authority to license any one to enter and commit waste, or to cut timber. (*Hubbard v. Elmer*, 9 *Wend*. 446.) Nor does a power to sell and convey in itself confer a power to mortgage. (*Bloomer v. Waldron*, 3 *Hill*, 361, *overruling dictum in Williams v. Woodard*, 2 *Wend*. 487, 492. *Coutant v. Servoss*, 3 *Barb*. 128.)

There are some cases where a power seems to be extended by construction. In *Williams v. Woodard*, (*supra*), it was held that a power "to bargain, sell, assure and convey," authorized a lease for life upon rents, with a covenant for a future conveyance in fee, upon a certain payment. And in *Craig v. Craig*, (3 *Barb. Ch.* 76,) the chancellor held that a power given by will to divide lands authorized the execution of a valid legal instrument, setting off the shares in severalty.

A naked power to sell must be strictly pursued. When the will contained a naked power to sell, accompanied by a direction, that the moneys arising from the sale should be invested, &c. for the purposes of the will, it was held that according to the obvious import of the power, the sale must be *for cash*, or something that could be invested; and a deed under it, reciting facts which showed that the grantor conveyed partly for money, and partly in consideration of an equitable claim of the grantee, was held a departure from its purpose, and therefore void. (*Waldron v. McComb*, 1 *Hill*, 111.) Though this case was reversed by the court of errors, it was upon a ground not affecting the above principle. (*Same case in error*, 7 *Hill*, 335.)

A power to sell land for a certain sum means for cash, unless there be something in the power, or in the usage of trade, to vary the legal construction; and a power to contract for such sale means for an absolute sale, and not for one optional with the vendee. If the power be *to sell* the land, an executory contract is no execution of it. (*Ives v. Davenport*, 3 *Hill*, 373.)

A special power to sell, given by will, must be exercised in the mode prescribed by it. If the will directs a sale of real estate at public auction, to pay off legacies, as they become due, and the ex-

ecutor sells at private sale before the legacies become due, the sale is void. (*Pendleton v. Fay*, 2 *Paige*, 202. *Egerton v. Conklin*, 25 *Wend.* 224.)

With respect to the person by whom a power can be executed, the rule formerly was that it could only be so done by a person *sui juris*; so that a *feme covert* could not execute a power so as to affect her own interest, if by the terms of the power it must be executed while she was sole. But unless so restricted she might execute any power, and it was immaterial whether it was granted to her before or after her coverture. So also an infant could execute a naked power. (*Crabbe's Law of Real Estate*, 689.) This subject is now regulated by the revised statutes, which enact that a general and beneficial power may be given a married woman to dispose, during her marriage, and without the concurrence of her husband, of lands conveyed or devised to her in fee. (1 *R. S.* 732, § 80. *Id.* 735, § 110.) But no power vested in a married woman during her infancy can be exercised by her until she attains her full age. (*Id.* § 111. *Frazer v. Weston*, 1 *Barb. Ch.* 240. *Strong v. Wilkins*, *id.* 13. *Jackson v. Edwards*, 7 *Paige*, 387. *Wright v. Tallmadge*, 1 *Smith*, 307. *Van Wort v. Benedict*, 1 *Bradf.* 115.)

When a power is given to several, all must unite in the execution of it by the rules of the common law. This principle is retained by the statute, with the addition that if previous to such execution, one or more of such persons should die, the power may be exercised by the survivor or survivors. (1 *R. S.* 735, § 112.) The application of this principle is more frequent to executors than to any other class of persons. The law has wisely provided that when a part only of the executors qualify and accept the trust, those who qualify have full authority without the others to execute a power to convey real estate, which is by the will conferred on the executors named in it. Those executors who do not prove the will are superseded by the grant of letters testamentary or of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors. (2 *R. S.* 109, § 55. *Ogden v. Smith*, 2 *Paige*, 198. *Taylor v. Morris*, 1 *Comst.* 358. *Willard on Ex'rs*, 144.)

But it seems if the supreme court discharges one of several executors, without appointing a new trustee in his place, the remaining executors are not authorized to execute a power in trust to sell the testator's real estate, so as to give a good title to the purchaser.

The court should, on discharging one or more, supply the vacancy by a new appointment, and then the original and substituted trustees can act together in fulfillment of the power. (*In the Matter of Van Wyck*, 1 Barb. Ch. 565, 570.)

The foregoing provisions do not extend to cases where a power is to be executed with the consent of third persons, and one of those persons dies before such consent is given. By the common law, in a case of that kind, the execution of the power was rendered impossible. The revised statutes have provided that when the consent of a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon. In the first case the instrument of execution, in the second the certificate, must be signed by the party whose consent is required; and to entitle the instrument to be recorded such signature must be duly proved or acknowledged in the same manner as if subscribed to a conveyance of land. (1 R. S. 736, § 122.) But the statute does not extend the principles applicable to the death of one of several grantees of a power, (1 R. S. 735, § 112,) to the case of the death of one of several whose consent to the execution of a power was required.

Accordingly where land was devised to a son for life, and then to his heirs, with power to him to sell and convey the same, by and with the consent of his mother and brother, and she died without consenting, and the son afterwards, with the consent of his brother, sold and conveyed the land, the court of appeals held that no title passed by virtue of the power. (*Barber v. Cary*, 1 Kern. 397.)

The acts for the more effectual protection of the property of married women, (*L. of 1848*, p. 307, and *of 1849*, p. 528,) and the act of 1860, concerning the rights and liabilities of husband and wife, chapter 90, do not affect the doctrine of trusts or powers. Those statutes indeed render the creation of trusts or powers in favor of married women, in a great measure unnecessary, for the security and protection of their rights. But they do not forbid the creation of trusts, or the granting of powers to them by persons desiring to secure them from want. Such trusts and powers for their benefit will still occasionally be made; though they will be of less frequent occurrence. The doctrine, therefore, is still a necessary part of our jurisprudence, and should be understood.

A power may be vested in any person capable in law of holding,

but cannot be exercised by any person not capable of aliening lands, except in the case of married women. (1 R. S. 735, § 109.)

The question as to how far a party having a disposing power over property shall, as against strangers, be treated as the absolute owner, is often an interesting and important one. In general, there is no more decisive incident of ownership, than the *jus disponendi*. It was one of the objections to trusts and powers that they were sometimes made subservient to purposes of fraud. They enabled the party beneficially interested, to escape from the consequences which attach to unfettered ownership.

The revised statutes contain suitable provisions on these subjects in favor of creditors and purchasers in good faith. When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into an estate in fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debts. (1 R. S. 732, § 81.) The same consequence follows when a like power of disposition is given to a person to whom *no particular estate is limited*. With respect to creditors and purchasers he is thus treated as owner of the fee. (*Id.* § 82.)

So also in all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, the latter is entitled to an absolute fee. (*Id.* § 83.)

This principle is not limited to a power of disposition by deed. A general and beneficial power *to devise* an inheritance, given to a tenant for life or for years, is equivalent to an absolute power of disposition as against creditors and purchasers. The grantee, who is enabled in his lifetime to dispose of the entire fee for his own benefit, must be deemed to have an *absolute* power of disposition. (*Id.* §§ 84, 85.)

Nor is this doctrine confined to cases when the power of disposition is granted to others. It is applicable to cases where the grantor, in any conveyance *reserves* to himself for his own benefit, an absolute power of revocation. With respect to the rights of creditors and purchasers, he is deemed the absolute owner of the estate, notwithstanding his conveyance. (*Id.* § 86.)

It has been seen that a general and beneficial power may be given to a married woman to dispose, during her marriage, and without

the concurrence of her husband, of lands conveyed or devised to her in fee. (*Id.* § 80.) And by a subsequent section, a special and beneficial power may be granted 1. to a married woman to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, *belonging to her*, in the lands to which the power relates; 2. to a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life. (*Id.* 87.) But neither of the foregoing sections authorize the giving to her of a *beneficial* power to dispose of an estate or interest in lands as a feme covert, which interest or estate does not belong to her; and which, upon the happening of the contingency or event provided for in the grant or devise, is limited to some other person.

Every instrument, except a will, in the execution of a power, is a conveyance which must be recorded to protect the estate conveyed against subsequent *bona fide* purchasers or grantees; and when such grant or conveyance is executed by a feme covert, she must acknowledge it upon a private examination before the judge or other officer, as in the case of other conveyances executed by femes covert. (1 *R. S.* 736, §§ 114, 117.) But her husband need not be a party to the deed. (*Jackson v. Edwards*, 7 *Paige*, 402.)

The acts for the more effectual protection of the property of married women already noticed, are prospective in their operation, (*Westervelt v. Gregg*, 2 *Kernan* 202,) and with regard to past transactions inoperative. They treat the feme covert more like a feme sole, than the revised statutes do in the article relative to powers. The act of 1849, allows a married woman to take by inheritance, or by gift, grant, or devise, or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise the same, in the *same manner*, and with the like effect, as if she were unmarried, and the same is exempted from the disposal of her husband, and a liability for his debts. Under this provision the supreme court have held that it is unnecessary for the husband to unite with the wife in the conveyance which she shall make, and that she is not required to acknowledge the execution of the deed on a *private examination* apart from her husband, or in any other way than if she were unmarried. (*Blood v. Humphrey*, 17 *Barb.* 660.)

The foregoing sections relative to a *beneficial* power to a married woman to dispose during her marriage, and without the con-

currence of her husband of her real estate, are confined to such real estate as *belonged* to her. There are other provisions in the act by which a power *in trust* may be given to a married woman, to dispose of an estate, or interest in lands, which do not belong to her, to or for the benefit of other persons, as the objects of the trust. The right to create such powers is unquestionably more extensive than that to create powers for the benefit of the persons to whom the power itself is granted. (*Jackson v. Edwards, supra.*)

A power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable of aliening lands, except in the case of a married woman of full age. She may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power, its execution by her during marriage is expressly or impliedly prohibited. (1 R. S. 735, §§ 110, 111. *Van Wert v. Benedict*, 1 Brad. 114. *Wright v. Tallmadge*, 15 N. Y. Rep. 307.) The court of appeals held in the last case, that the foregoing sections completely removed the disability of coverture in respect to the execution of powers. She can therefore execute a power in trust, as well as a beneficial power.

A general power is in trust when any person, or class of persons, other than the grantee of such power, is designated as entitled to the proceeds or any portion of the proceeds, or other benefits to result from the alienation of the lands according to the power. (1 R. S. 734, § 94. *Selden v. Vermilyea*, 1 Barb. 58.)

A special power is in trust, 1st, when the disposition which it authorizes is limited to be made to any person or class of persons, other than the grantee of such power; 2d, when any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power. (*Id.* § 95, S. C.)

Unless its execution or non-execution is made expressly to depend on the will of the grantee, every trust power is *imperative*, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested. And it does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust. (*Id.* §§ 96, 97.)

Such a power is not to be construed as discretionary, because the terms used are simply those of authority, and not terms of discretion,

request, or recommendation; nor because a right of selection is given to the donee of the power. A power, it is said, is always in trust, when a disposition is limited to be made to a class, unless its execution is made in terms to depend upon the mere discretion of the grantee. It is always imperative, when the property given, and the persons to whom it is given, are certain. (*Dominick v. Sayre*, 3 Sand. S. C. R. 555.)

In cases where a disposition under a power is directed to be made to, or among or between several persons, without any specification of the share or sum to be allotted to each, courts of equity were accustomed to hold that all the persons designated shall be entitled to an equal proportion. But when the terms of the power imported that the estate or fund was to be distributed between the persons so designated, in such manner or proportions as the trustee of the power might think proper, it was held that the trustee of the power might allot the whole to any one or more of such persons in exclusion of the other. And if the trustee of the power, with the right of selection, should die, leaving the power unexecuted, its execution could be decreed in equity for the benefit equally of all persons designated as objects of the trust. These principles are incorporated into the revised statutes. (1 R. S. 734, §§ 98, 99, 100.) In *Dominick v. Sayer*, (*supra*), the subject is fully examined by the learned judge (DUER) himself, one of the revisers, and well acquainted with the principles on which the revision was based.

In *Hoey v. Kenney*, (25 Barb. 396,) the testator gave one half of his estate to his wife, "to be held and enjoyed by her during her natural life, and by her to be divided and distributed by will among my [the testator's] relatives, in such shares as she may see fit and deem to be just." The widow enjoyed the property during her life, and died without having made a will. It was held that as the wife did not exercise the power of distribution, and it was a power in trust for the benefit of third parties, the law would distribute the property equally among the whole class among whom she might have distributed it. This, it was said, enabled all who were capable of inheriting at her death, to take the land, although they were aliens at the testator's death. Belonging to the class to whom the widow might have given it, they were therefore in the class to whom the law distributes the property in equal shares. (*Dominick v. Sayre*, *supra*.)

When a power in trust is created by will, and the testator has

omitted to designate by whom the power is to be exercised, its execution devolves on the supreme court. (1 R. S. 734, § 101.) This is merely applying to powers the same doctrine which we have before seen is applicable to trusts. Courts of equity, independently of any statute regulation, never permitted a trust to fail for the want of a trustee; and this principle is expressly declared and enacted by the revised statutes. (1 R. S. 730, § 71.)

Where a testator directs his lands to be sold for the payment of his debts, or for the payment of legacies, and appoints executors, the executors have the power to sell, although they are not named as the donees of the power otherwise than by naming them as executors. The reason given for this is that it belongs to the executor to pay the debts and legacies; and the testator having directed it to be done by means of a sale of his land, the executor should have the power to sell as incident to the accomplishment of the testator's main purpose. (*Per Ruggles, in Meakings v. Cromwell*, 1 Seld. 139, 140.)

It matters not whether the testator gives money or directs his land to be sold and the proceeds distributed; by the settled principles of equitable conversion, it is money that the testator gives and not land, and the executors are the proper persons to execute the will, though not expressly ordered to do it. Thus, when the testator, by his will, gave to his wife, for life, the rents of certain lands, and directed that after her death the lands should be sold, and the proceeds divided among three persons named in the will, it was held that this was a gift of *money* and not of *lands*, and was valid, though the beneficiaries were aliens. The will being silent as to the persons who should sell the land, it was further held that power was given by implication to the executors to make the sale; and that such power was well executed by a deed from one executor, the others not having qualified. (*Meakings v. Cromwell, supra.*)

Had the executors not taken the power to sell by *implication*, in the foregoing case, no one being expressly authorized to do so, it would have devolved on the court, under the 101st section, before cited, to designate the person by whom the power could be exercised.

There are several cases in which there is a strict analogy between a power in trust, and a trust in its appropriate sense. The statute has, therefore, wisely applied to powers various regulations prescribed in the cases of trust. (*Compare* 1 R. S. 134, § 102, *and* 1 R. S. 130, §§ 66-71.)

Hence a payment in good faith to a party having a power to receive it, does not make the party paying responsible for the application of the money. When the purposes for which the power was created have ceased, the power itself ceases also. On the death of the surviving grantee of a power, the power does not descend to his heirs nor pass to his personal representatives, but if unexecuted, vests in the supreme court, and is to be executed by some person appointed for that purpose, under the direction of the court. The court may accept the resignation of the grantee of a power, under the like regulations as are prescribed for receiving the resignation of a trustee; the court may remove him if he has violated or threatened to violate his duty, or if he is insolvent or his insolvency is apprehended, or if for any cause he is deemed an unsuitable person to execute the power; and appoint a new grantee of the power in place of the one resigned or removed, or cause the power to be executed by some one of the officers of the court under its direction.

We have seen by what words, and by what instruments a power may be *created*; it remains to show by what instruments and in what manner it may be *executed*. As a general rule it may be laid down that when the instrument creating the power prescribes the manner of its execution, that manner must be followed. Thus if the power be created by will, and it directs a sale of real estate at *public auction*, to pay off legacies as they become due, and the executor sells at *private* sale before the legacies become due, the sale is void. (*Pendleton v. Fay*, 2 Paige, 202.)

The time of executing a trust power of sale depends on the intention of the grantor of the power. If the testator devises a life estate to his wife, and authorizes his trustees, after his death, to sell the land and distribute the proceeds among the children of B., who is then living, a sale before the death of the wife will be premature. (*Per Ch. Walworth, Egerton v. Conklin*, 25 Wend. 224.)

The courts have been very strict in requiring an adherence to the terms of the power. The revised statutes have introduced many wise provisions on this branch of our jurisprudence. Thus, a power vested in several persons must be executed by all, unless before its execution one or more of them shall have died, when the power can be executed by the survivor. (1 R. S. 735, § 112. *Ogden v. Smith*, 2 Paige, 198. *Taylor v. Morris*, 1 Comst. 358.) No power can be executed except by some instrument in writing, which would be

sufficient in law to pass the estate under the power, if the persons executing the power were the actual owners. (1 R. S. 735, § 113.) And by the subsequent section, every instrument except a will in execution of a power, and although the power may be a power of revocation only, shall be deemed a conveyance within the meaning, and subject to the provisions of that part of the revised statutes relative to the proof and recording of conveyances. Where a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions relative to the execution and proof of wills of real estate. (*Id.* § 115.) Where a power is confined to a disposition by grant it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party executing the power. (*Id.* § 116.)

A power to sell real estate does not authorize the giving of a mortgage. (*The Albany Ins. Co. v. Bay*, 4 Comst. 9. *Coutant v. Servoss*, 3 Barb. 128.)

If a married woman execute a power by grant, the concurrence of her husband as a party is not requisite, but the grant is not a valid execution of the power unless it be acknowledged by her on a private examination, in the manner prescribed by the act in relation to the proof and recording of conveyances by married women. (1 R. S. 736, § 117. *Id.* 758, § 10.)

When the grantor of a power shall have directed or authorized it to be executed by an instrument, not sufficient in law to pass the estate, the power shall not be void, but its execution shall be governed by the rules before prescribed in the article. (*Id.* 736, § 118.)

The effect of this enactment is to refer to the courts the execution of a power when the *instrument pointed out by the grantor* of the power is defective, as they had already done in case no *person was designated* in the will creating a power, by whom it was to be exercised.

It sometimes happens that the grantor of a power directs certain formalities to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate. In cases of that kind the statute provides that the observance of such additional formalities shall not be necessary to a valid execution of the power. (*Id.* § 119.) In other cases, again, the conditions annexed to a power may be merely nominal, and evince no intention

of actual benefit to the party to whom or in whose favor they are to be performed. In such cases, those conditions may be wholly disregarded in the execution of the power. (*Id.* § 120.)

The intentions of the grantor of a power as to the mode, time and conditions of its execution, must be observed, except as to such matters as are merely nominal, or are unnecessary to pass the estate, subject, however, to the power of the supreme court to supply a defective execution of the power. (*Id.* § 120, 121.) When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or must be certified in writing thereon. In the first case the instrument of execution, in the second the certificate, must be signed by the party whose consent is required; and to entitle the instrument to be recorded such instrument must be duly proved or acknowledged, in the same manner as if subscribed to a conveyance of land. We have already seen that if the consent of more than one person is required, and the consent of one or more is not given, either by death or otherwise, the power cannot be executed. (*Id.* § 122. *Barber v. Cary*, 1 *Kernan*, 397, *ante.*) The statute has provided that no disposition by virtue of a power shall be void, in law or in equity, on the ground that it is more extensive than was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be valid. (1 *R. S.* 737, § 123.)

The omission of the grantee of a power to recite, in his instrument of conveyance, the power by virtue of which it is made, does not render it invalid, provided he had a right to convey, under his power, what he professes to convey. (*Id.* § 124.)

Instruments in execution of a power are effected by parol, both at law and in equity, in the same manner as conveyances by owners or trustees. (*Id.* 125.)

Lands embraced in a power to devise pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear expressly, or by necessary implication. (*Id.* 126. *Botler v. DePeyster*, 25 *Barb.* 539. *Jackson v. Delancy*, 13 *John.* 537.)

A power is subject to the incidents of other property. An estate or interest given by a parent to a descendant, by virtue of a beneficial power, or of a power in trust with a right of selection, is deemed an advancement to such defendant, within the provisions of the

chapter of the title to real property by descent. Where a party attempts to suspend the alienation of property by an instrument in execution of a power, the period from which the computation is made is not from the date of the instrument, but from the time of the creation of the power. (1 R. S. 737, §§ 127, 128.)

No estate or instrument can be given or limited to any person by an instrument in execution of a power, which such person would not have been capable of taking under the instrument by which the power was granted. (*Id.* § 129.)

When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may by virtue of such power create any estate which she might create if unmarried. (*Id.* § 130.)

A married woman cannot convey her real estate directly to her husband. She cannot, therefore, by uniting with him in a deed of her real property to a trustee, reserve a valid power to appoint it to his use, or one by which she can, by a last will and testament, devise to him. A will by a married woman, in pursuance and in execution of a power so reserved, by which she devises her real estate to her husband, is inoperative and void. During coverture she possesses no power to convey by deed to her husband, and is destitute of any testamentary capacity. Such power or capacity cannot be created over lands belonging to herself in fee, by virtue of any agreement made, *during coverture*, between herself and her husband. It can only be created or reserved by an ante-nuptial agreement. Having power to grant or devise, while a *feme sole*, she may by such an agreement reserve a power by the due execution of which she may make a valid will in favor of her husband. (*Demprey v. Tyler*, 3 Sandf. S. C. R. 73.)

But there is a way, aside from the doctrine of powers, or trusts, by which a married woman can vest her real estate in her husband. She can unite with him in a conveyance of it to a third person in fee. A reconveyance of it by such third person to the husband in fee, will vest the title in him. (*Id.*)

With regard to the execution of powers, it is held that there must be a substantial compliance with every condition required to precede or accompany its exercise. (*Per Gardiner, J. in Allen v. De Witt*, 3 Comst. 278. *Chance on Powers*, 172, § 454. 1 R. S. 737, § 121. *Roseboom v. Mosher*, 2 Denio, 61.) This rule is well illustrated in *Allen v. De Witt*, (*supra*.) A testator by his will author-

ized his executors "to sell his real and personal estate, in such parcels, at such times, and for such considerations as they should judge proper for the purpose of discharging his debts and creating funds for the support of his family." *After payment of debts*, he directed the *avails* of his property to be equally divided among all his children. *Before* the testator's debts were paid, the husband of one of the daughters being indebted to the plaintiff, procured from the executors a conveyance of a portion of the real estate for the purpose of enabling him to mortgage it to secure the debt. Nothing was paid for this conveyance, but the husband agreed to disencumber the land by paying the mortgages, and then to reconvey to the executors, or in default thereof, that the value of the land might be charged against his wife's distributive share in the estate. On a bill filed to foreclose the mortgage given by the husband and wife according to this arrangement, it was held by the court of appeals that the conveyance was not an execution of the power contained in the will, and passed no title, and therefore that the mortgage was not a lien upon the interests of the testator's other heirs in the premises. Under such a power it seems that a sale of the real estate by the executor, for the purpose of distribution among the testator's children, could not be made until after the debts were paid, and that the sale should then be absolute for money, or funds capable of distribution according to the will.)

In *Roseboom v. Mosher*, (*supra*,) it was said by Bronson, Ch. J. that when a power is given by will to executors to sell lands, in case of a deficiency of personal assets to pay debts and legacies, and no *estate* is devised to the executors, the purchaser, to sustain his title, must show the fact of such deficiency. A distinction was taken in that case between an *actual* deficiency, and the *opinion* of the executor as to such deficiency. In the one case the power is not well executed, unless a deficiency be shown; in the other, where the testator has authorized the sale by the executor, if *in his opinion* it shall become necessary, for the payment of debts and legacies, the necessity need not be shown. The fact that the executor makes the sale is evidence of his opinion as to the necessity, and the conveyance is conclusive. (*Kellogg v. Slauson*, 1 Kern. 302.)

With regard to the defective execution of a power in trust, in whole or in part, the statute enacts that its proper execution may be decreed in equity, in favor of the persons designated as the objects of the trust; (1 R. S. 737, § 131;) and by the subsequent section, the

same remedy is given in favor of purchasers claiming under a defective conveyance as from a like defective conveyance from actual owners. Courts of equity, before the statute, were in the habit of supplying defects in the execution of powers. (*Butcher v. Butcher*, 9 Ves. 394.) It is a well established branch of equity jurisprudence, and rests upon its jurisdiction, to relieve against mistakes. Such relief is not granted in favor of every one, nor for every species of mistake. A mistake in law affords no ground for relief. (*Story's Eq. J.* §§ 113, 180 *et seq.*) And there must be clear evidence of the existence of the mistake of fact. If the defect be in the omission of some condition which was merely nominal, and evincing no intention of actual benefit to any of the parties, provision is made in the statute, and no doubt equity would have relieved, independently of the statute, in favor of the proper parties. (*Willard's Eq. Jur.* 84.)

But equity cannot relieve against the consequences of failing to comply with the material directions of the party creating the power. Therefore when the power prescribes that a particular instrument, as a deed, is required, it cannot be executed by will; so a power which is expressly required to be executed by will, cannot be executed by any act which is to take effect in the lifetime of the grantee of the power. (*Reid v. Shergold*, 10 Ves. 370. *Crabbe's Law of Real Property*, p. 708, &c.)

The power to sell lands contained in a mortgage or other conveyance, intended to secure the payment of money, is deemed a part of the security and vests in the assignee of the mortgage, and may be executed by him, or by any person entitled to the money secured by it. (1 R. S. 738, § 133.) We have already seen that such a power is coupled with an interest, and survives the mortgage, and is irrevocable. (*Bergen v. Bennet*, *supra.* *Knapp v. Alvord*, 10 Paige, 205.)

With regard to the revocation of powers, we have seen that every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power. (1 R. S. 735, § 108.) The statute contains suitable guards against fraud, by treating the party who has received a power of revocation as absolute owner of the estate, so far as the rights of creditors and purchasers are concerned. (1 R. S. 733, § 86.)

It has been held that when a person takes by execution of a power, he takes under the authority, and under the grantor of the power, equally as if the power and the instrument executing it were incorporated in one deed. (*Doolittle v. Lewis*, 7 *John. Ch.* 45. *Litt.* 169. *Co. Litt.* 113 a. *Cook v. Derchenfield*, 2 *Atk.* 562, 567.) The rule is the same whether the power has reference to real or personal property.

Powers may either be extinguished, released or suspended, according to the nature of the power, or the acts of the grantee. (*Crabbe's Law of Real Property*, 721.)

SECTION II.

Of Powers of Attorney to convey Lands.

The provisions of the article in the revised statutes on powers which we have been considering, do not extend to a simple power of attorney to convey lands in the name and for the benefit of the owner. (1 *R. S.* 738, § 134.) It was deemed sufficient to let that class of cases rest upon the common law.

A power of attorney is an instrument in writing under seal, by which the party executing it appoints another to be his attorney, and empowers such attorney to act for him, either generally in all matters or business, or especially to do some specified act or acts, in his name and behalf. (*See the word in Burrill's Law. Dict.*)

If it be intended that the attorney shall make a complete conveyance of real estate, or any interest therein, which by law is required to be by deed, the power of attorney must be executed by the principal under hand and seal. The instrument conferring the authority must be executed with the same solemnity as the instrument which the attorney is authorized to execute in the name of his principal. (*Co. Litt.* 52 a. *Blood v. Goodrich*, 9 *Wend.* 68.) An authority to execute a deed, must be itself a deed, or in other words an instrument under seal. (*Lawrence v. Taylor*, 5 *Hill*, 113.)

An agent may be orally empowered to contract to sell land, for the contract may be without seal. (*Champlin v. Parish*, 11 *Paige*, 405. *McWhorter v. McMahan*, 10 *Paige* 386. *Lawrence v. Taylor*, *supra*.)

As a general rule it may be said that any party having the complete ownership of an estate, has the *jus disponendi*, and unless laboring under some legal disability, may convey the same in person by deed, or authorize another by power of attorney under seal, to

convey it for him. Married women, infants, lunatics and other persons not *sui juris*, are not in general capable of appointing an attorney. (*Per Bronson, Snyder v. Sponable*, 1 Hill, 567.)

If a party can himself execute a deed of an estate, it would seem on principle that he might authorize another to do it. As a feme covert under the act of 1849 (*L. of 1849*, p. 528) can hold to her sole and separate use real and personal property, and can convey and devise the same "in the same manner and with the like effect as if she were unmarried," and as her deed thereof does not require to be acknowledged private and apart from her husband, (*Blood v. Humphrey*, 17 Barb. 660,) no reason is perceived why she may not execute a power of attorney under seal and empower such attorney to convey the same in her name. The statute in effect removes the disability of coverture with respect to the disposal of her separate property, without prescribing any restriction as to the mode.

The acts of 1848 and 1849, probably relate to married women, inhabitants of this state. The act of 1835, chapter 275, makes a separate provision with respect to non-residents. It provides that when such married woman shall unite with her husband in executing any power of attorney for the conveyance of real estate situated in this state, the conveyance executed in virtue of such power shall have the same force and effect as if executed by such married woman, in her own proper person; provided that the execution of such power of attorney by such married woman shall first have been proved or acknowledged, according to the provisions of the revised statutes in relation to conveyances executed by married women residing out of this state.

Before the power has been executed, the principal has the right to revoke it, except when the power is coupled with an interest, as it has been declared in the instrument itself to be irrevocable. The power of sale in a mortgage, it has been seen, is a part of the security itself, and affords an instance of irrevocable powers. When a power of attorney to sell and convey lands for another has been recorded, an instrument under seal revoking it, is not deemed effectual unless the instrument containing such revocation be recorded in the same office in which the instrument containing the power was recorded. (1 R. S. 763, § 41.) Notice, or a copy of the instrument of revocation, should also be served on the attorney.

An authority must be strictly pursued. A power of attorney authorizing the attorney to sell and execute conveyances and assur-

ances in the law of the lands sold, does not authorize the attorney to bind his principal by any covenants. Any act varying from the terms of this power is void. (*Nixon v. Hyserott*, 5 *John*. 58. *Gibson v. Cold*, 7 *id.* 390.)

An attorney has no right to delegate his authority to any other person, unless the instrument contains a power of substitution. The principle is *delegata potestas non potest delegari*. (*Broom's Maxims*, 665.) The party to whom the authority is given must execute it himself, and he cannot delegate it to another. The principal in general employs the agent from the confidence he reposes in him, and it would be a violation of the trust to transfer the authority to another without the express consent of the party who created the power. The principle has a wide application to the doctrine of agency, but we are discussing it only with reference to powers of attorney to sell land.

It is usual in powers of attorney of this kind, if the principal so pleases, to insert in the power a clause authorizing the attorney to substitute one or more attorneys under him to do the act and to retain the power of revocation.

If the authority be given to two or more, it cannot be executed by one alone. All must join. An authority to three jointly is not well executed by two. (*Co. Litt.* 181 b. *Green v. Miller*, 6 *John*. 39. *Franklin v. Osgood*, 14 *id.* 553. *Sinclair v. Jackson*, 8 *Cowen*, 543.) This is the undisputed rule with respect to private matters between individuals. A different rule obtains in matters of public concern. To obviate the inconvenience of this rule it is provided that the surviving executor or administrator, when the grant has been made to several, may execute the power. But the authority may be so given that the surviving attorney may act. It may be given to several jointly or severally, in which case either one could execute the authority; and if it be given to them or the survivors or survivor of them, the death of one or more, so long as one remains, will not end the power.

We have said the party making the power of attorney may, at any time before it is executed, revoke it. (*See ante*, p. 269.) But there are other acts which will put an end to the authority. It must be executed during the life of the party creating it, and therefore his death determines the power. (*Bac. Abr. tit. Authority, E.*) This applies only to a naked power. A power coupled with an interest is not revoked by the death of the grantor of the power. (*Id.*)

With regard to the manner in which the power must be executed, it may be in general remarked that it must be executed in the name of the principal. If the attorney affix only his own name and seal, the grant is void, although in the body of the instrument it be stated that it is the agreement of the principal by his attorney. (*Townsend v. Corning*, 23 *Wend.* 435. *Same v. Hubbard*, 4 *Hill*, 351. *White v. Skinner*, 13 *John.* 307.) No particular form of words is necessary to be observed by the attorney in executing the instrument, provided the words used import the requisite facts. It should appear upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the attorney merely. (*Wilks v. Back*, 2 *East*, 142. *Townsend v. Hubbard*, *supra*.) And when the deed is executed for several parties, it is said not to be necessary to affix a separate and distinct seal for each, if it appear that the seal affixed was intended to be adopted as the seal of each of the parties. (*Id.*) It will be less likely to lead to disputes, if approved forms be used and a seal affixed to each name.

A power of attorney to convey lands should be duly acknowledged or proved in the same manner that conveyances of real estate are required to be acknowledged or proved, and that it be in all cases recorded in the county where the lands are situated. It should be referred to in the deed executed in pursuance of it by some intelligible description, if it be not in substance set out or recited at large. As it will form a part of the grantee's title to the land, care should be taken that it, as well as the deed, should be duly proved and acknowledged and recorded in the proper county.

All powers of attorney receive a strict interpretation, and the authority is never extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect. (*Sandford v. Handy*, 23 *Wend.* 260. *Nixon v. Hyserott*, *supra*.)

A party dealing with an agent is chargeable with notice of the contents of the power under which he acts. (*Warwick v. Warwick*, 3 *Atk.* 294. *Willard's Eq. Juris.* 250, 608.)

CHAPTER III.

OF MARRIAGE SETTLEMENTS.

SECTION I.

Of the origin, policy and effect of Marriage Settlements.

The doctrine of uses and trusts and powers, of which we have treated in the preceding chapters, is the foundation of marriage settlements. These, in England, are the most voluminous and complicated instruments prepared by the conveyancer. They are of rare occurrence in this country. Their general object is to provide a life estate for the wife beyond the control of her husband, and to secure a provision for the issue of the marriage, which neither the parents, or the creditors of the husband, can defeat.

The subject, in most of its aspects, belongs to treatises on equity jurisprudence, or to such as are specially devoted to the law of husband and wife, or the rights of married women. But as it calls for the services of the conveyancer, it falls, to a certain extent, appropriately within the subject of the present treatise.

By the common law, the personal property of the wife becomes, by the act of marriage, absolutely the property of the husband. This embraces not only what she had at the time of the marriage, but what she afterwards acquires by gift, or grant, or bequest, or from her own earnings. Her personal property consists of three kinds, viz: *chattels personal*, *choses in action*, and *chattels real*. Her chattels personal are absolutely, by the common law, vested in the husband. He requires the aid of no court to establish his claim. The husband is entitled to reduce her *choses in action* to his possession during the lifetime of the wife; and they then become his absolutely. If he dies without doing so, they become hers by survivorship. (*Whitaker v. Whitaker*, 6 John. 112.) But if she dies before he has reduced them to possession, he takes them only as her administrator, and not by survivorship; and he is liable for her debts, after her death, to the extent of the assets which he receives from her. (*L. of 1853, ch. 576, § 1.*) The chattels real of the wife, such as terms for years, whether legal or equitable interests, belong to the husband in a qualified manner. He may transfer them in his

lifetime, and thus become entitled absolutely to the avails of them. But he cannot dispose of them by will, and if he fails to dispose of them while he lives, they survive on his death to his wife. He has, by the common law, the same right to her chattels real which accrue to her during the coverture ; and he is entitled to the rents and profits of her real estate during the coverture. As a compensation for these benefits, the law throws upon the husband the burden of the wife's debts, which were incurred while she was sole, and makes him liable for them at any time during the continuance of the marriage, to the extent of her separate estate and property. (*Clancy*, 2-10. *Co. Litt.* 351 a. *Bac. Ab. tit. Bar. and Feme, C.* *Willard's Eq. Jur.* 473, 474. *L. of 1853*, p. 1057, §§ 1, 2.)

It is the design of marriage settlements to escape from the extreme rigor of the common law rules, and to remove some of the disabilities which the condition of the marriage state imposes. The principles and practice which the court of chancery adopted in furtherance of these objects, were mainly derived from the civil law. In the first case, which was brought before our highest court, in which the power of a married woman having separate property, to dispose of it at her will and pleasure, when not expressly restrained in the mode of exercising that will, the judges took occasion to express their opinions as to the policy of the law in this respect. Chief Justice Spencer said : "I confess that my partialities in favor of marriage settlements are not so strong as to induce any desire to see the law altered. Generally speaking, the rules of the common law, which give to the husband all the wife's personal property, and the rents and profits of her real estate during coverture, are better calculated, in my judgment, to secure domestic tranquillity and happiness, than settlements securing to the wife a property separate from and independent of the control of the husband. An improvident and dissipated husband may squander his wife's property, and reduce both of them to penury and distress. On the other hand, the possession by the wife of property independent of and beyond the control of the husband, would be likely to produce perpetual feuds and contention. Marriage is a union of persons and interests, *pro bono et malo*, and the ancient provisions of the common law show forth in our own country decisive proofs of its benign and salutary influence." (*Jaques v. Methodist Epis. Church*, 17 *John.* 580.) The language of Justice Platt is no less explicit : "I lament," says the learned judge, "the complicated and artificial anomalies in the
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relations of domestic life which have grown, and are still growing, out of the practice of marriage settlements. They give to the wife the amphibious character of a *feme covert* and a *feme sole*. I view it as an adulteration of that holy union; as a divorce *pro tanto* of the marriage contract. A wife in the *independent enjoyment of her separate estate*, armed with distrust of her husband, and shutting out his affections and confidence, by refusing to give her own in mutual exchange, is an object of compassion and disgust. Legal chastity cannot be denied to her; but there is danger that the sacred institution of marriage may degenerate into mere form. It is sometimes, in practice, little more than legalized prostitution; and the parties seem to have no higher objects than sexual intercourse, and the sanction of legitimacy for their offspring. If, in the rapid progress of refinement in civilization, it shall be thought expedient to go one step farther, and to allow the wife, by ante-nuptial contract to stipulate for an exemption from personal control over her by the husband, then the *quasi* divorce would be extended one degree further, so as to confer on her the independent enjoyment of the rights and privileges of a kept mistress. But she would have little claim, indeed, to the endearing appellation and character of a wife. . . . If matrimony is not safe and desirable, without these trammels, and fences, and reservations and restrictions, I say marry not at all." (*Id.* 583.)

But although the policy of marriage settlements was thus early questioned by learned judges, they were assumed by the legislature, in making the revision of the statutes in 1830, as an existing mode of providing for the necessities of families, and suitable regulations were prescribed to guard them from abuse. (*See the article concerning Uses and Trusts*, 1 R. S. 727, and the article concerning Powers, *Id.* 732, *passim*.) And the acts of 1848 and 1849 for the more effectual protection of the property of married women, (*L. of 1848*, p. 307; *L. of 1849*, p. 528,) expressly enact that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place. This was obviously inserted to prevent any implication being drawn from those acts against the legality of ante-nuptial agreements, which had already been made. We have already, in another connection, alluded to these statutes. It is believed that one of the objects which they were intended to accomplish was to diminish the necessity for marriage settlements in future. By permitting a married female to

take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and to convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the same effect as if she were unmarried, and by declaring that such property shall not be subject to the disposal of her husband, nor be liable for his debts, the legislature has given to a feme covert, with respect to her property so acquired, as much power of disposition as is usually contained in marriage settlements, and in many respects more. They have left the power of disposition unfettered by any restriction, save such as is applicable to all persons. In furtherance of the same policy, the second section of the act of 1849 has prescribed a way by which a married woman whose property is held by a trustee, may be put in the beneficial enjoyment and control of all or any portion of such property, for her sole and separate use and benefit. Her trustee is required to convey to her all such property held in trust, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same. The judge will not give such certificate unless he finds on such examination, that the married woman has sufficient capacity to manage and control her property. He has nothing to do with the policy of the law; and the trustee has no discretion to refuse to convey to the married female the trust property, on being served with the written request of the female and certificate of the judge. "*May*" evidently means "*must*," in this connection.

The operation of this law works a qualified repeal of the exception in the statutes of wills, which excluded married women from the power of devising their real estate by last will and testament. (2 R. S. 57.) This exception when inserted in the original statute of wills in the reign of Henry the 8th, may have been dictated by wisdom and sound policy. But since then, and especially in this country, there has been a revolution in the tenure of real property; and the social position and general education and intelligence of females have placed them on a level with the other sex, and removed the reasons on which the exception was based. The repeal of it by the act of 1849, extends only to the property specified in the third section, and is not made universal. Nor does that act confer upon

a married woman her own earnings, nor change the principle of the common law, which vests, on the marriage, the personal estate of the wife in the husband. It applies only to such property as she acquires after and during the marriage, by inheritance or by gift, grant, devise or bequest from any person other than her husband. The property which she owned before the marriage, and that which she acquires by her own earnings, were left by the act of 1849, to the operation of the common law.

The act of 1860, ch. 90, (*L. of 1860, p. 157,*) goes further. It provides that the property, both real and personal, which any married woman, at the time of the passing of that law, owned as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; *that which she acquires by her trade, business, labor or services carried on or performed on her sole and separate account*; that which a woman, married in this state, *owns at the time of her marriage*, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent. This statute abrogates that rule of the common law which vests, on the marriage, the personal estate of the wife in the husband; and that other rule which gave to the husband the earnings of the wife during the coverture. It also so far enlarges the provisions of the act of 1849, as to give to the married female the same control and interest in the real estate owned by her at the time of the marriage, and the rents, issues and proceeds of all such property as, by the act of 1849, was given to her in respect to property obtained by her by inheritance, or by gift, grant, devise or bequest, from any person other than by her husband.

The law of 1860, in some respects, departs from the principles of the act of 1849. While under the former act a married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and her earnings from her trade or business, labor or services, are her sole and separate property, and may be used and invested by her in her own name, a different rule prevails with respect to her control over her real property. Under the act of 1849, she was left under no greater restraint in

this respect over her property mentioned in that act, than an unmarried woman. But the act of 1860, while it permits a married woman, possessed of real estate as her separate property, to bargain, sell and convey such property, and enter into any contract in reference to the same, provides that no such conveyance or contract shall be valid, without the assent in writing of her husband, except in the cases mentioned in subsequent sections. Those cases are when the married female cannot procure the assent of her husband, in consequence of his refusal, absence, insanity or other disability, she may still make such conveyance or contract, without the assent of her husband, if she can procure leave to make such contract from the county court of the county where she shall at the time reside. The statute points out the mode of making this application, and prescribes the circumstances under which the court is authorized to allow such married woman to sell and convey her real estate, or to contract in regard thereto, without the assent of her husband: they are, 1, if the husband has willfully abandoned his wife, and lives separate and apart from her; 2, if he is insane, or imprisoned as a convict in any state prison; 3, if he is an habitual drunkard; 4, if he is in any way disabled from making a contract; or 5, if he refuses to give his consent, without good cause therefor. If either of these circumstances concur, the court is required to cause an order to be entered in its minutes, authorizing such married woman to sell and convey her real estate, or contract in regard thereto without the assent of her husband, with the same effect as though such conveyance or contract had been made with his assent. (*L. of 1860, p. 158, §§ 5, 6.*)

A deed executed by a married woman under the acts of 1849 or 1860, does not require for its validity, that her husband should be united with her in the instrument. It should however be acknowledged by her on a private examination, apart from her husband, under the statute. (*Gillett v. Stanley, 1 Hill, 121.*) She can pass her title by such deed, but neither of these statutes has relieved her from the inability to make covenants for title in such deed. Though she joins with her husband in a deed in which there are covenants for title, the husband alone is liable for a breach of them, and as to the wife, they are void. (*Whitbeck v. Cook, 15 John. 483. Jackson v. Vanderheyden, 17 id. 107.*) Nor can she be estopped by her covenant of warranty from claiming a subsequently acquired estate in the land conveyed by her. (*Teal v. Woodworth, 3 Paige, 470. Carpenter v. Schermerhorn, 2 Barb. Ch. R. 314.*) But she is

as effectually concluded, as any other grantor, from denying any admitted fact which is essential to the effect and operation of the deed. (*Grant v. Townsend*, 2 *Hill*, 554.)

That these statutes were intended to obviate the necessity of a marriage settlement is farther evident by the provision contained in the act of 1860, removing the disability of coverture in respect to actions. It is expressly enacted that a married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, or which may after the passing of the act, come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole. She is also allowed to bring, and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment is declared to be her sole and separate property. (*L. of 1860*, p. 158, § 7.)

The foregoing enactments are innovations of the common law. They give to a married woman, as far as they go, the same privileges which are enjoyed by the unmarried. If the statute had stopped here, it would have still left the husband liable upon such contracts of the wife as she was permitted to make. But a subsequent section provides that no bargain or contract made by any married woman, in respect to her sole and separate property, or any property which may thereafter come to her by descent, devise, bequest or gift of any person except her husband, and no bargain or contract entered into by any married woman, in or about the carrying on of any trade or business under the statutes of this state, shall be binding upon her husband, or render him or his property in any way liable therefor. (*L. of 1860*, p. 159, § 8.)

The provision of the common law which required the husband to join and be joined with the wife in all actions in which she was the meritorious cause of action, seems thus to be modified. For though the statute does not in terms, say that the husband shall not be joined in an action against his wife in respect to the matters contained in that section, it seems to be clearly unnecessary to make him a party to an action in which no liability attaches to him or his property. If he is neither entitled to the fruits of the recovery in the one case, nor liable to the consequences of a defeat in the

other, the principles on which the common law required him to join or be joined no longer remain.

How far the principle of allowing a married woman to sue and to be sued with respect to her own property, as if she were sole, will affect the exceptions in her favor, in the statute of limitations, has not yet been decided. That exception is based upon the theory that she labors under a disability to seek redress by an action. This exception is in part the compensation for the disability which the law imposes. (*Code of Procedure*, § 88.) So far as the disability is removed, she ceases on principles of equity, to be entitled to the compensation. But probably while the statute remains in force, she is entitled to the benefit of all its provisions.

The statutes above referred to do not cover all the cases between husband and wife, nor do they forbid the making of marriage settlements, or essentially alter the law of trusts and powers. To a certain extent they render marriage settlements unnecessary; though they do not invalidate them, if the parties choose to resort to that mode of securing the property of the wife.

In framing a marriage settlement, it is desirable that the property should be vested in a trustee. This, however, is said not to be indispensable, though much to be preferred. In *Strong v. Skinner*, (4 Barb. 546,) the subject was fully examined by the court and the early cases reviewed. The learned judge, who delivered the opinion of the court, held that since the decision of Chancellor Kent, in *Bradish v. Gibbs*, (3 John. Ch. 522,) the validity, in equity, of an ante-nuptial agreement between husband and wife, without the intervention of a trustee, by which the wife reserves to herself the power of disposing of her own property, either real or personal, during coverture, has not been doubted. Though such an agreement becomes extinguished at law by the subsequent marriage, yet equity supports it, and will compel the husband to perform it. In such a case, whether the property be real or personal, equity will treat the husband as trustee, and hold him to account as such. (*Blanchard v. Blood*, 2 Barb. S. C. R. 352. 2 *Story's Eq. Juris.* § 1380. 2 *Kent's Com.* 162. 1 *Mad. Ch.* 376.)

In the creation of a trust for a married woman, it is as essential in a marriage settlement, as it is in a testamentary disposition of property, that it should not violate the statute as to the suspension of the power of alienation, if it be real property, nor the statute as

to the accumulation of personal property, if the latter kind of property be the object of the trust. The revised statutes forbid the suspension of the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case where a contingent remainder in fee is allowed to be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. (1 *R. S.* 723, §§ 15, 16. *Harris v. Clark*, 3 *Seld.* 242.)

With respect to personal property, the statute provides that the absolute ownership thereof shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator. In all other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in the first chapter of the act in relation to future estates in lands. (1 *R. S.* 773, §§ 1, 2. *Harris v. Clark*, *supra*.)

We have already anticipated, in our chapter on trusts, most of the cases which are applicable to the subject under consideration. The foregoing provisions of the revised statutes have been repeatedly the subject of consideration by our courts. In most instances the question has arisen under wills; but the principle is the same in all cases.

A suspension of the absolute power of alienation for *a certain term*, however short, avoids the estate; as "until my youngest daughter is eighteen years of age." The suspension must be bounded by life. (*Boynton v. Hoyt*, 1 *Denio*, 53.)

A few cases will be adverted to in order to illustrate the provisions of the statute. (In *Wood v. Wood*, 5 *Paige*, 596,) there was a devise in trust for three infants, to pay them the rents and profits until they were severally twenty-one or twenty-two years old, with cross-remainders in case any of them should die without issue before coming into his shares with remainder over in case they all so

died without issue. It was held by the chancellor that the limitation over was void for remoteness.

It has been settled that a devise in trust of an entire estate, to receive the rents or income thereof and to distribute it among several *cestui que trusts*, cannot be considered as a separate devise of the share of each *cestui que trust*, so as to protect the share of each as a tenant in common during his own life. If the trust is to endure for a longer period than two lives in being at the death of the testator, the whole devise in trust is void. (*Coster v. Lorillard*, 14 *Wend.* 265. *Hone v. Van Schaick*, 7 *Paige*, 231.) Nor can the absolute power of alienation be suspended by means of a trust term, unless the term itself is so limited that it must necessarily terminate during the continuance or at the expiration of not more than two lives in being at the death of the testator. (*Hawley v. James*, 16 *Wend.* 61. *Hone v. Van Schaick*, *supra*.)

With regard to personal property, it has been held that a trust to recover the income and apply it to the uses of a *cestui que trust* for his life, or a shorter period, renders the interest of the *cestui que trust* inalienable, and suspends the absolute ownership of the trust fund; and if such trust be so limited as to suspend the absolute ownership for more than two lives in being at the death of the testator, it is void. This is put upon the analogy to the restrictions of the revised statutes upon the power of alienating a similar interest in the rents and profits of the real estate so limited in trust. (1 *R. S.* 730, § 63.) Hence an absolute limitation of a trust term for twenty-one years in gross, and a disposition of the rents and income by division among the testator's numerous children and grandchildren and their descendants, for the whole of that period, was held to be void. (*Hone v. Van Schaick*, *supra*; *affirmed*, 20 *Wend.* 564.)

In creating trusts under the revised statutes, the conveyancer should, as far as practicable, follow the precise language of the law. If he deviates from the exact phraseology in which the power is given, he cannot be certain that the trust will be valid. The 55th section of the statute of uses and trusts, (1 *R. S.* 728,) authorizes a trust to receive the rents and profits of lands, and *apply them to the use of any person*. Whether, under this provision, a valid trust could be created to receive the rents and profits, and *pay them over* to the beneficiary, was for a long time a vexed question, and led to much discussion. The opinions of the judges differed. Chief Justice

Savage and Judge Bronson held that such a trust was void ; while Chancellor Walworth and Judge Nelson held it to be valid. (*See Coster v. Lorillard*, 14 *Wend.* 320, 351, 377, 331, 394. *Hawley v. James*, 16 *id.* 156. *Gott v. Cook*, 7 *Paige*, 539.)

The question was at length definitively settled in favor of the validity of such a trust, by the court of appeals, in *Leggett v. Perkins*, (2 *Comst.* 297.) This expression has been supposed to be equivalent to a direction to apply the income to the use of the beneficiary. Either expression is therefore proper ; and that power should be selected which is the most appropriate to the circumstances and condition of the party to whom it belongs.

It should also be provided in the marriage settlement, not only that the payment of the income by the trustee to the wife, should be a valid payment, but that her receipt therefor, without the interference of her husband, should be a protection to the trustee.

There was at an early day, before the revised statutes, a difference of opinion between Chancellor Kent and the court of errors, with respect to the power of a married woman under a marriage settlement over her separate property. The chancellor thought that she must execute the power in the manner pointed out in the articles ; and that she was to be treated as a feme sole, only to the extent of the power given her in the marriage settlement. The court of errors held, that though a particular mode of disposition was especially pointed out in the settlement, it would not preclude the wife from adopting any other mode of disposition, unless she was *expressly* restrained in the instrument to a particular mode. (*See Jaques v. Methodist Epis. Ch. supra*, and *S. C.* 3 *John. Ch.* 87.)

The decision of the court of errors rendered the wife more completely and absolutely a feme sole in respect to her separate property, than was before supposed to be the case. The limitation in marriage articles to a particular mode of alienation, was intended as a check to the secret and insensible but powerful marital influence, which might be exerted unduly, yet in a manner to baffle all inquiry and detection. (2 *Kent's, Com.* 166.) The difference between the two courts is now of little consequence in this state. In cases falling within the acts of 1849 and 1860, the wife is left wholly without control as to the mode of alienation ; and in cases, if there be any, not within those statutes, the framer of the marriage articles can easily restrict the unmarried woman to a particular mode of disposition, and require the consent of her trustee, if such a safeguard

against the influence of the husband is desired. The rule as originally declared by the chancellor, seems to have been preferred in other states. That decision was made before the revised statutes, and was grounded upon the common law.

Marriage settlements are usually dictated by the prudence and forethought of parents or friends, from an anxious desire to protect the wife from the consequences of the improvidence, misfortunes or vices of the husband. Unless it was competent to prevent the wife from anticipating her income, by an entire disposition of the whole at once, the provision in her favor would be found to be fruitless. If her power of alienation over her separate property is left the same as it is under the acts of 1849 and 1860, there is nothing to prevent her from yielding to the importunity of her husband, and to surrender at once the fund which was intended to afford her a support for life. To prevent this, a clause against anticipation was formerly allowed to be inserted in the marriage articles. The revised statutes, while they do not forbid, seem to render this unnecessary; for they have thrown an effectual protection over the interest of persons not able to protect themselves. The 63d section of the statute of trusts (1 R. S. 730,) enacts that no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign, or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created is assignable. And the 65th section of the same title enacts that when the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be void. These sections have received the authoritative exposition of the courts. In *L'Amoureux v. Van Rensselaer*, (1 Barb. Ch. 37,) the chancellor said that previous to the adoption of the revised statutes, a trustee might hold the mere naked legal estate in real property, for a feme covert, while the whole equitable interest and estate therein was in her, and subject to her control. In relation to such an estate, therefore, she was considered as a feme sole, and could charge her equitable interest in the property with any debt she might think proper to contract on the credit thereof, which was not inconsistent with the trust or with the nature of her interest in the premises, and which was authorized by the instrument or conveyance creating the trust. All such mere personal trusts, even in favor of femes covert, are now abolished, and in the few cases which are authorized by the revised statutes, the

whole estate, both legal and equitable, is vested in the trustee. The statute also declares in terms, in the 60th section, that the person for whose benefit the trust is created shall take no estate or interest in the land ; but may enforce the performance of the trust in equity. The *cestui que trust*, therefore, has no right to charge the trust property, even for necessary repairs thereon, without the authority of the trustee. This doctrine has been repeatedly reaffirmed. (*Noyes v. Blakeman*, 2 Seld. 567. *Belmont v. O'Brien*, 2 Kern. 394.) In *Noyes v. Blakeman*, (*supra*,) the case was this : " In October, 1842, the defendant Henry Blakeman and Ann Maria Blakeman, his wife, united in a conveyance of certain lands, (the fee of which was in Mrs. Blakeman as sole heir of her late father,) to Henry F. Belden, in trust : *First*, to pay over of the rents and profits, the interest upon the mortgages and other incumbrances ; the necessary taxes and assessments ; the necessary expenses incurred in the needful repairs and insurance of the buildings on said premises ; and to pay the remainder thereof to the said Ann Maria, upon her own separate receipt, notwithstanding her coverture, to the intent and purpose that the same, or any part thereof, might not be at the disposal of, or subject to the control, debts, liabilities or engagements of the said Henry Blakeman, or of any future husband she might have, but at her own sole and separate use and disposal. *Secondly*, upon her decease, during coverture, to apply and dispose of the income, as she should by will appoint, and in default of such appointment, to apply said income to the maintenance and education of her children, if any survived her, and if not, to pay the same to Henry Blakeman for life ; with power to devise said lands by will, and to appoint a new trustee or trustees as often as a vacancy should occur." Under this settlement it was held that the trustee, during the life of the beneficiary, had the whole legal and equitable estate in the lands, subject only to the execution of the trust ; and that the married woman for whose benefit the trust was created, had no estate or interest in the lands or in the future income, upon which she could create a lien or charge, for the expense of protecting the trust estate, or for any other purpose. In the same case it was held that a married woman could not incur an obligation, binding her personally, even for the expense of protecting property held by a trustee for her use.

It would seem that in a trust created since the revised statutes, a clause against anticipation was not necessary, to insure the protec-

tion of the interest of a married woman. It is however advisable, that the estate should be conveyed in trust to a trustee, in conformity to law; and not be left in such a manner that the wife would be compelled to seek the aid of a court of equity to convert her husband into a trustee for her benefit. The property of a married woman held in trust since the revised statutes, is more effectually guarded for her benefit, against the importunities of her husband, than that which she derives under the acts of 1849 and 1860. In the latter cases, she has the same right of disposition as an unmarried woman, and has not the friendly counsel of a trustee to guard her interests from abuse.

The foregoing cases relate to trusts created in real estate. The revised statutes have not attempted to define the objects for which express trusts of personal estate may be created; as they have done in relation to trusts in real estate. Such trusts therefore may be created for any purposes which are not illegal. Indeed it would be very difficult, says the chancellor, if not impossible, in many cases, to create and preserve future and contingent interests in personal property without the intervention of a trustee; although such trustees would not be necessary, under the provisions of the revised statutes, to create and preserve such future and contingent interests in lands, or other real estate. (*Gott v. Cook*, 7 *Paige*, 534. *Kane v. Gott*, 24 *Wend.* 661, *per Cowen, J.* *Day v. Roth*, 4 *Smith*, 448. *Willard's Eq. Jur.* 423.)

Most of the cases which are reported in this state arose under marriage settlements executed previous to the revised statutes, and were decided according to the principles then in force. The law in relation to trusts and powers underwent great changes when the statutes were revised in 1830. Many of the trusts usually inserted in marriage settlements in England, would now be invalid if introduced into such articles, in this state, at the present day. Many others are rendered useless and unnecessary by our existing laws; and others are inapplicable to our law of tenures, converting estates tail into estates in fee simple.

In framing articles of marriage settlement regard must be had to the existing state of our law relative to trusts and powers. The more simple they can be drawn, the less likely will they be to lead to litigation. The tendency to preserve estates for distant and remote generations is severely checked by the policy of our laws. They should allow the receipt of the wife of the income to be a good

discharge to the trustee, and should provide for her ultimate disposition of the property at her death, by a will, or an instrument in the nature of a will.

It cannot be expected in a brief chapter on this interesting subject, that a full discussion can be had of all that appertains to marriage settlements. If free from fraud, they will be upheld against the claims of the creditors of the husband. Equity affords its aid to execute covenants contained in them in favor of any person within the influence of the marriage consideration. The husband and wife and their issue fall within this influence.

The general division of this class of agreements is into such as are made before marriage and in contemplation of that relation, and such as are made afterwards. The first are sometimes called ante-nuptial, and the last post-nuptial, agreements. We shall, in the further consideration of this subject, subjoin some remarks on each of these kinds of agreements, and notice some of the incidental and collateral principles which usually attend them.

SECTION II.

Of Ante-nuptial Agreements and Settlements made before marriage.

The general rule with respect to a nuptial contract is that rights dependent on it are governed by the *lex loci contractus*. (*Decouche v. Savetier*, 3 *John. Ch.* 190.) Our courts have occasionally had to investigate the foreign law and apply it to the transactions of the parties. These cases are not of frequent occurrence. We shall invite the attention of the reader to only a few of them. In the case of *Le Breton v. Miles*, decided in the court of chancery of New York, in 1840, (8 *Paige*, 261,) the subject was very fully considered by the chancellor. In that case, two natives of France entered into an ante-nuptial contract in New York relative to their future interests in property which they had at the time of the marriage, or which they should acquire during the coverture, which contract was made in reference to the law of France, and to an intended residence in that country, and was by its terms to be afterwards drawn up in the due form of a marriage contract according to the French law, but the parties after their marriage continued to reside in this state. It was held notwithstanding, that the rights of the parties under such contract must be governed by the laws of France which were in force at the time of the commencement of the marriage.

In this case the ante-nuptial agreement is set out at full length, and is accompanied with the remarks of the chancellor upon it. Many principles were settled with reference to the French law, which it is unnecessary to notice in this place. It was said that when parties marry with reference to the laws of a particular state or country, as their intended domicil, those laws govern in the construction of a marriage contract entered into between them, so far at least as their rights of personal property are concerned. But the remedy to secure such property, and to protect the rights of the parties to the contract, must be according to the law of the country, in the courts of which such remedy is sought.

In *De Barante v. Gott*, (6 Barb. 492,) the ante-nuptial contract was executed in France with the solemnities required by the laws of that country, and was executed with reference to a marriage of the parties, which took place two days after. In one branch of the articles, it was stipulated that in case of the death of the wife, without having children, her husband receiving the real estate of which she should die possessed in the United States, should be immediately sold, and the proceeds remitted to her husband. It was held that this possession operated as a grant to the husband, contingent upon the event which happened. Independent of the ante-nuptial articles, the husband would not have been entitled, by the law of this country, to succeed to the real estate belonging to his wife at the time of her death. Yet full effect was given to the marriage articles.

In that case there was no trustee appointed by the marriage articles by whom the real estate of the wife, on her death, could be sold and the proceeds remitted to the husband. This, however, was held to be no obstacle, as equity never suffers a trust to fail for want of a trustee, and land directed to be sold and converted into money is, for all purposes, on the principles of equitable conversion, to be treated as if so converted. (*See also Craig v. Leslie*, 3 Wheaton, 563; *Gott v. Cook*, 7 Paige, 534, on the subject of equitable conversion.) The subject of marriage contracted in France, under the law of community, was also considered, in *Vail v. Vail*, (17 Barb. 226.)

In affording relief in matrimonial contracts made with reference to the laws of another country, courts are governed by the law of comity. (*Story's Conflict*, ch. 2.) But no aid, it is presumed, will be granted in carrying out matrimonial engagements made with reference to a foreign country, when the principles sought to be enforced are against sound morals and the settled laws and institutions

of the country whose courts are resorted to for relief. Thus, agreements based on the principles applicable to polygamy, though the parties contemplate a residence in a country where polygamy is authorized by law, will not be aided by our courts.

It is, however, mainly with reference to cases arising in this country that the conveyancer will be called upon to act. A settlement made by the wife before marriage is in derogation of the marital rights of the husband, and if made without his knowledge, is fraudulent and void. The fraud consists in disappointing the hopes and expectations raised by the marriage treaty. The proper way is, to have the intended husband and wife join in the articles which convey the estate to the trustee, then both are bound by it. Such instrument should contain the trusts by which the property is held, and the powers which are intended to be reserved or conferred upon the wife. Of course the settlement here spoken of, is of the property of the wife.

But marriage articles often provide for vesting in the trustee for the benefit of the wife property belonging to the husband. Both parties should join in such instrument. We have seen in a previous chapter, in what manner a wife may bar her right to dower, by an ante-nuptial agreement, and in what cases she is put to her election between her jointure and her dower. (1 *R. S.* 741, §§ 9-12. *McCartee v. Teller*, 2 *Paige*, 511, 561. *Ante*, p. 66, 69.) It will not be necessary to repeat what was there said.

We have seen that the husband has only a qualified interest in the wife's chattels real. He may reduce them to possession; but if he fails to do so and dies, they survive to the wife, both at law and in equity. Now the wife's contingent right of survivorship may be barred by a settlement, made upon her before marriage, or by a settlement after marriage, in pursuance of an agreement before marriage. Such a settlement, if adequate to the wife's fortune, has been considered as a purchase of it, though there was no agreement between the parties to that effect. (*Blois v. Lady Hertford*, 2 *Vern.* 501. *Clancy*, 102.) The wife cannot have her jointure and fortune both. The one is supposed to be the equivalent of the other.

Previous to the revised statutes of 1830, and as the law stood at that time, an absolute conveyance in fee, to a married woman, whether by deed or devise, carried with it a present life estate to the husband, and an estate by curtesy, if there was issue born alive of

the marriage. A parent or friend, who wished to vest in the wife the *uncontrolled* disposition of the fee, could not do it by a direct grant or devise to her in fee. It was to enable him to do so and to prevent the consequences which resulted from her ownership of real estate during the marriage, that the 80th section of the article on powers was passed. If the grantor wished that the husband should have no control or interest in the property in right of his wife, he had only to annex to the grant or devise a power to the married woman, authorizing her to dispose, during her marriage, and without the concurrence of her husband, of the lands so conveyed or devised to her in fee. This power the owner of the fee has a right to confer; and it precedes the interest which the husband would otherwise have in it; and on being executed by the wife, overreaches any inchoate rights which as husband he would have at common law. Under such a power a wife could, even before the laws of 1848, 1849 and 1860, relative to the rights of married women, take a conveyance in fee to her separate use, with a power to convey to any one whom she might choose, for her own benefit; and thus a very proper marriage settlement could be made without the intervention of trustees. (*Wright v. Talmadge*, 15 N. Y. Rep. 313.)

We have seen in a preceding chapter, (*see Part 2, ch. 2.*) that by the 110th section of the article on powers, the disability of coverture, in respect to the execution of powers, is completely taken away, and a married woman may without the concurrence of her husband, execute, during coverture, any power which may be lawfully conferred upon any person, unless the instrument creating the power forbids its execution during marriage.

The 80th section, before adverted to, relates to a *general* and *beneficial* power, given to a married woman, &c. What constitutes a general and beneficial power is sometimes open to controversy. In *Jackson v. Edwards*, (22 Wend. 498,) where an estate was granted during the joint lives of a husband and wife, with power to the wife of *appointing* the fee either by deed or will; and if she died before her husband, without executing the power, the estate to go to her issue; and in default of issue, to her right heirs—she taking the absolute fee if she survived her husband; it was held that the wife had a general and beneficial power, within the provisions of the statute, of appointing the fee. (*S. C.* 7 Paige, 386. *Frazer v. Western*, 1 Barb. Ch. 240. *Wright v. Talmadge*, *supra*.)

We have seen that trusts in marriage settlements may be so created.
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ated that the property is inalienable until the purposes of the trust have been accomplished. In such a case the wife is relieved from all importunity from her husband, because such importunity would be fruitless. But in a country like ours, where the condition of affairs is constantly changing, and where the interests and happiness of all parties may be greatly benefited by a change of domicile from one part of the country to another, it may well be doubted whether there is not more lost than is gained by the unalterable stability of a settlement. Few persons desire to be absolutely confined to one spot, however desirable in itself, and no one can anticipate all the exigencies that may arise in the affairs of any family. In settlements where the wife has the disposition of her estate during coverture, as well as in cases arising under the late acts of 1849 and 1860, she can always, by uniting with her husband in the deed, convey an indefeasible title to the estate. She may execute a mortgage of her own estate, under a power reserved to her in a marriage settlement executed previous to the marriage. (*Leavitt v. Pell*, 27 Barb. 322.) In the last mentioned case, the wife, by a marriage settlement executed in 1827, in effect reserved the right and power to sell and dispose of her real estate included in the settlement as she should think proper, and as if she were a feme sole; and to revoke the uses and trusts contained therein, and to declare new uses and trusts, by deed under the hands and seals of herself and her husband. In 1834, a tripartite indenture was executed by P. the husband, as party of the first part, Mrs. P. of the second part, and S., the trustee of the wife, of the third part, by which, after reciting the seisin of S. in trust for Mrs. P. of certain lands, subject to powers of revocation and appointment of new trusts, the employment of her separate estate to buy the same, and an agreement to revoke such trusts, and that the same should be held by S. upon the trusts thereafter mentioned—the parties of the first and second parts to carry such agreement into effect by virtue of all the powers vested in them, revoked all existing uses, estates, trusts, powers and limitations, in respect to such lands, other than those intended to be executed, limited and appointed to the use of S. the said premises upon the trusts therein mentioned; and conveyed the same to him in fee, upon such trusts, to wit: 1. To receive the rents thereof and apply the same to Mrs. P.'s separate use, free from the control, debts or engagements of any husband of her's. 2. After her death, to convey such premises as she should direct by last will and testament, &c. and in default of such

appointment, to receive the rents thereof and pay the same to Mrs. P. for life. 3. After the death of both Mr. and Mrs. P. and in default of such appointment by her, to her issue, and in default of issue to her heirs. This instrument also contained this proviso, viz: That Mrs. P. might, notwithstanding her coverture, with the consent of Mr. P. if living, or alone if he were dead, by deed, *mortgage*, charge, or make chargeable, such premises, with and for the payment of any sum and sums of money, &c. It was held by the supreme court in the first district, that this deed or instrument was a disposition and revocation within the meaning of the marriage settlement of 1827, as to the premises mentioned therein; and that by it, and as a part of such disposition and revocation, Mrs. P. reserved the power to mortgage the said premises with the consent of her husband. And the husband and wife, and S. the trustee, having subsequently joined in executing a mortgage to the North American Trust and Banking Company; it was further held, that such mortgage was a proper execution of the power, and was valid; the assent of the husband being shown by his executing the same, and the legal title being conveyed by S.'s execution thereof.

In general the marriage articles should be executed by parties able to contract. The rule seems to be universal that all deeds, or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority, which alone are void. (*Bool v. Mix*, 17 *Wend.* 119. *Gillett v. Stanley*, 1 *Hill*, 121.) The objection to the validity of a marriage settlement on the ground that the parties were infants, can only be made by the parties themselves. It cannot be raised by the trustee. Such instrument is not void, but voidable only. (*Jones v. Butler*, 30 *Barb.* 641.)

Although the whole real and personal estate of the wife be secured to her separate use, the husband is notwithstanding bound to maintain her and family during coverture. (*Meth. Ep. Church v. Jaques*, 1 *John. Ch.* 450.) Nor do either of the acts of 1848, 1849 or 1860, relieve the husband from his liability for the torts of his wife, or derogate from his power of personal control over her. (*Hasbrouck v. Weaver*, 10 *John.* 247.)

SECTION III.

Of Post Nuptial Agreements, and Settlements made after Marriage.

It is a general principle of the common law that a deed from the husband directly to the wife is void, though she might purchase of others without the consent of her husband. (*Co. Lit.*, 3 a. *Shepard v. Shepard*, 7 *John. Ch.* 60. *Strong v. Skinner*, 4 *Barb.* 552.) Hence post nuptial marriage settlements can rarely be made without the aid of a court of equity. In *Shepard v. Shepard*, (*supra*), Chancellor Kent held that a suitable provision by deed from a husband to his wife, will be supported in equity.

If a settlement be made after marriage in pursuance of a prior agreement entered into *before* marriage, it is valid not only between the parties, but as against creditors. It is merely doing by the act of the parties what the court would order to be done. (*Reade v. Livingston*, 3 *John.* 488.) Marriage itself is a sufficient consideration to uphold such a settlement.

Questions with respect to the validity of post nuptial settlements most frequently arise between the creditors of the husband and the wife, or her trustee in whom the title is vested. It is well settled that a voluntary settlement either of lands or chattels, by a person indebted at the time, for the benefit of his wife and children, is void as against his creditors. This rule applies as well to such property as the creditor could not reach, by execution at law, such as choses in action, &c., as to tangible chattels. Indeed, the process of the court can, according to present practice, be made available against choses in action and equitable interests, as well as against real property or chattels. (*Bayard v. Hoffman*, 4 *John. Ch.* 452. *Reade v. Livingston*, *supra*. *Code*, § 292, &c.)

But if the husband, though indebted at the time, settles upon the wife personal estate which came to her by descent from her relatives, to no greater extent than the court of chancery would have directed him to do upon a bill filed against him by the wife to protect her equitable claim to a support for herself and her children out of the same, such voluntary settlement will be sustained as against the creditors of the husband; although it may be void as to other property contained in the same conveyance to the trustee. (*Wickes v.*

Clarke, 8 *Paige*, 161.) Under the late acts relative to the property of married women, (the acts of 1849 and 1860,) the creditors of the husband could not reach such property at all; and they, therefore, would have no equity to disturb a settlement of it by the husband in favor of his wife.

As against creditors whose debts existed at the time, a post nuptial settlement will not be permitted to stand beyond the value of the consideration. (*Garlick v. Strong*, 3 *Paige*, 452.)

Although post nuptial contracts between husband and wife, by which property is set apart to her separate use, are void at law, yet if they arise out of considerations moving from her, they will be sustained in equity. Thus, where the husband, who was about to sell his estate, agreed with his wife, and with the knowledge of the purchaser, that if she would join in a deed of the premises so as to release her dower, she should receive a certain portion of the purchase money as her separate property, free from the control of her husband; and the purchaser gave a note to the wife for her share of the purchase money, and the agent for the wife, in whose hands the note had been placed for her use, loaned a part of the money received on the note, and took a bond and mortgage directly to the wife; and the husband afterwards assigned the mortgage to the original purchaser of the estate, without the assent of the wife, or her agent, it was held that in equity the bond and mortgage belonged to the wife, and that she was entitled to the money due thereon for her separate use. (*Garlick v. Strong*, *sup.* *Searing v. Searing*, 9 *Paige*, 289.)

With regard to what is a sufficient consideration for a post nuptial settlement as against creditors; not only her joining with her husband in a deed so as to discharge her claim to dower in the land conveyed, but her equity in a legacy, before the late statutes, have been held to be sufficient for this purpose. (*Patridge v. Havens*, 10 *Paige*, 618.)

Although upon a deed *inter partes* a stranger cannot, at law, recover on a covenant contained therein for his benefit, yet a court of equity will give effect to stipulations of this kind in marriage articles, and other conveyances in trust, upon the application of the party for whose benefit the provision was intended.

Thus, where the bill charged, that by a post nuptial agreement between the defendants, a husband and his wife, the property of the wife was conveyed to trustees, and it was agreed that a certain specified part of the property should be vested in stocks, or put out at

interest as a provision for the complainant for whom the wife considered herself under a moral obligation to provide, and that the interest or the dividends on the stock should be paid to the wife, free from the control of her husband, for the use and benefit of the complainant, according to the directions of the wife during her life, and that upon the death of the wife the principal should become the property of the complainant if she survived her; and the bill further charged that the husband refused to permit his wife to receive the dividends on the stock, and to pay them over, according to her direction, to the complainant; a general demurer to the bill for want of equity, put in by the husband for himself and wife jointly, was overruled. (*Bleeker and wife v. Bingham*, 3 *Paige*, 246. *King v. Whitely*, 10 *id.* 465.)

No technical form of words is necessary to create a trust for the separate use of a married woman. If the property be vested in a trustee, and the trust declared to be for her sole use and benefit, and the money to be paid to her individually, it is equivalent to providing for payment to the wife upon her separate receipt, and to exclude the husband. (*Stuart v. Kissam*, 2 *Barb.* 493.)

Before the late statutes relative to the estates of married women, the separate estate existing in the wife beyond the control of the husband, was subject to the incidents of ownership. In regard to such property she was treated in equity as a feme sole. She might dispose of it without the solemnity of a private examination. Such disposition was in the nature of an appointment. (*Albany Fire Ins. Co. v. Bay*, 4 *Barb.* 407; *S. C. on appeal*, 4 *Comst.* 9.) She might mortgage it. Her receipt given to the executor, upon payment of a legacy absolutely belonging to her, as her separate property, was a good discharge. (*Guild v. Peck*, 11 *Paige*, 475.)

Having a separate estate subject to her own disposal, she might give it to her husband, as well as to any other person, if her disposition of it was free, and not the result of flattery or force, or improper treatment. (*Cruger v. Cruger*, 5 *Barb.* 226.)

Her separate estate was not liable, at common law, for her debts contracted before marriage; and the only ground upon which it could be reached in equity, was that of appointment; that is, some act of hers, after marriage, indicating an intention to charge the property. (*Vanderheyden v. Mallory*, 1 *Comst.* 452.)

The common law cast upon the husband a temporary liability for the debts of the wife contracted before marriage. This liability

ceased with the coverture, unless judgment had been recovered against both. If the wife survived the husband, and judgment had not been recovered, her sole liability revived. Hence her private property could not be reached for such antecedent debts. But when a debt was contracted by a woman during coverture, either for herself or as surety for her husband, this was *prima facie* evidence of an appointment, or appropriation of her separate estate to the payment of the debt. (*Id.* S. C. 3 Barb. Ch. 9.) These principles were somewhat modified by the act of 1853, chapter 576. Now, an execution upon a judgment against husband and wife, for the debt of the wife contracted before marriage, binds only the separate estate and property of the wife; and the husband is no longer liable for the debts of the wife contracted before marriage, only to the extent of the property acquired by the marriage.

The tendency of the legislation in this state has been for many years in favor of increasing the provision which the common law made for married women and for widows. Our exemption laws, the acts of 1848, 1849 and 1860, and those concerning the administration of the estates of deceased persons, are examples of this tendency. These have already been sufficiently noticed.

In 1840, in furtherance of the same policy, it was made lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, required to be made payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors; but such exemption was not to apply when the amount of the premium annually paid should exceed three hundred dollars. In case of the death of the wife, before the decease of her husband, the amount of the insurance, it was provided, might be made payable, after her death, to her children for their use, and to their guardian, if under age.

This modification of common law rules in favor of married women was equivalent to a marriage settlement, to the extent of the sum limited by the act. It was a beneficent provision which thus enabled her or her friends to place a certain sum beyond the reach of the husband's creditors, in case he should be insolvent when he died. But the act of 1840 was not based on the supposition that

the premium on the policy of insurance was to come in any case from the estate of the husband. If it was supplied from her separate property, or from any other source than from her husband's estate, his creditors had no equity to it. But it was obvious that in most cases the premium would be paid by the husband. If an insolvent should take the funds, which in justice belong to his creditors, and employ them in effecting an insurance upon his life for the benefit of his wife and children, the law would follow the fund on the death of the husband and make it available to the payment of his debts, upon the principle that every man should be honest before he is generous. As between his wife and children and other kindred of the deceased, the provision of the statute would be sustained in favor of the former, whatever might be the case between them and his creditors.

The act of 1858, ch. 187, p. 306, removed some of the difficulties which have been suggested, and extended this exemption of the insurance to all cases where the premium annually paid out of the funds or property of the husband shall not exceed three hundred dollars. This is, in effect, withdrawing so much more of the estate of a deceased person from the claims of creditors in favor of the widow and children. If the annual premium paid out of the estate of the husband exceeds three hundred dollars, it is not protected by the statute, from the claims of the representatives and creditors of the husband. But if the premium does not come from the estate of the husband, his representatives or creditors have no just title to it.

CHAPTER IV.

OF MERGER.

The subject of merger has been adverted to in several places in this treatise; but its importance and the intricacy of the doctrine seem to justify a more full discussion of it in a separate chapter.

It is not easy to give the definition of merger. Cases may easily be put in which it takes place; but that is rather a description of its effect than a definition of the term. The case put by Blackstone is an apt illustration of the rule. Whenever, he says, a greater estate and a less coincide and meet in one and the same person, without

any intermediate estate, the less is annihilated or is said to be merged, that is, sunk or drowned in the greater. (2 *Black. Com.* 177.)

Merger is the act of the law, by which the less of two vested estates is extinguished, by uniting in the same person in the same right, without any intermediate estate. The object is to accelerate the estate in which the merger takes place. The estate in which the merger takes place is not enlarged by the accession of the preceding estate. After the merger, the only subsisting estate continues precisely of the same quantity and extent of ownership as it was before the accession of the estate which was merged. Thus if the owner of the reversion in fee, depending on an estate for years, acquires the title of the tenant for years, the two estates are blended into one. The estate of the reversioner in fee is not enlarged, because he has still only a fee, but the possession is accelerated by the annihilation of the estate for years. He is not said to have a fee simple and an estate for years, but a fee simple only, with the right of immediate enjoyment.

We cannot, in a single chapter, discuss at much length the doctrine of merger. It has been very fully treated by Mr. Preston in his treatise on merger, to which we are greatly indebted for the following pages on this subject. We shall therefore bring together, in successive sections, some of the leading principles on the subject, and incorporate with them such decisions of our own courts as may seem to be material.

SECTION I.

Of the difference between Merger and certain Acts of Law analogous to it.

There were at common law five different acts of law, which resembled each other in many respects, but which were still distinguishable from each other. They were merger, suspension, extinguishment, discontinuance and remitter.

Merger, we have already seen, is the extinguishment by act of law of one estate in another, by the union of the two estates in the same person, in the same right, without any intermediate estate. The term *estate* in this definition must be understood in its technical meaning; as being the interest which one has in lands, or other property, rather than the land itself. In this sense it is nearly synonymous with the words *right*, *title* and *interest*. The word is

often used in a broader sense, as denoting the *corpus*. Thus, a man speaks of his farm as being his estate.

Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. Thus, a rent may be extinguished. A common may be extinguished. Extinguishment is sometimes confounded with merger, but they are distinguishable. Merger is only a mode of extinguishment; and applies to *estates* only under particular circumstances. But *extinguishment* is a term of general application to rights as well as estates. (*Crabbe on Real Property*, § 1488.)

Suspension is a partial extinguishment, or extinguishment for a time.

Discontinuance is defined by Preston to be the cesser of a seisin under one estate and the acquisition of a seisin under a new, and necessarily a wrongful act. It occurred where a tenant in tail created a larger estate in the land than he was by law entitled to. It operated to take away the right of entry, and put the issue or those in remainder to the necessity of bringing a real action. (3 *Bl. Com.* 167.) This species of title does not exist in this state, or in this country; and it is substantially abolished in England by 3 and 4 Will. 4, ch. 27, § 39.

Remitter is the act of the law which puts an end to the seisin under the wrongful and new acquired title, and restores the rightful owner to the ancient seisin and better title. Remitter is the same in effect, as to *rights* and *titles*, which merger is as to *estates*, and extinguishment is of *things*. The doctrine of remitter proceeds on the ground that the possession is cast on an *innocent* person, who has an existing title to the possession; or that the freehold is cast on a person who has a right which is remediable, and who has done no act by which he has estopped himself to insist on his ancient title; and then as often as the possession, where the entry is lawful, or the immediate freehold, when the right is remediable, devolves to that person by act of law, or is vested in him by the act of the parties, without his concurrence or voluntary consent, or at a time when that person, (as in the case of an infant, feme covert, &c.) is under an incapacity of giving assent to any act which would be prejudicial, the law does of itself restore the party to that estate to which he had a subsisting right of possession at the time when he entered, or a subsisting right of action at the time when the freehold devolved on him. A remitter, when it operates, universally supplies the

place of an entry, when an entry is lawful; and of an action when an action might be maintained. (*Preston on Merger*, 12, 13.) It redresses the injury done to the person in whom the right resides, by putting him into possession, or obtaining for him seisin of the freehold under his rightful title, in the same manner, and to the same extent, as he could restore himself to his estate by means of an entry, or an action. (*Id.*)

The difference between remitter and merger may be thus concisely stated. Remitter revives the seisin under the ancient title, in favor of the person in whom the possession of the freehold becomes vested, under a defeasible estate. Merger, on the contrary, puts an end to a subsisting estate, though held by a good title, and it accelerates the right of possession under a remote estate, residing in the same person. (*See Co. Litt.* 347 *b*; *Litt.* § 659 *et seq.*; *Preston on Merger*, 14.)

SECTION II.

Of the Origin of Merger, and of the Effect of Intention upon it.

It is, perhaps, impossible to trace the doctrine of merger to its origin; or to assign it to any one principle to which there may not be some exceptions. The most obvious reason is that which results from the maxim, *Nemo potest esse dominus et tenens*. This is subject to fewer objections than any other one principle which has been given as the foundation of the doctrine. This applies to actions and causes of actions as well as to estates. A man cannot be plaintiff and defendant in the same matter, any more than he can be both landlord and tenant of the same estate. If by the course of the transaction between parties, the estate of the tenant is vested in that of the landlord, it is extinguished or rather merged in that of the larger estate. If the owner of the fee simple, having granted an estate for years, should afterwards, during the continuance of the estate for years, succeed to the latter estate by operation of law or purchase, with no intervening estate, a merger would take place of the estate for years in the estate of inheritance. The owner of the fee simple would thus become landlord and tenant. He would be entitled to the rent and the benefit of the other covenants in the lease, and be at the same time the person, by whom that rent was to be paid, and these covenants are to be performed. The law deals

more wisely when it extinguishes the less estate in the greater, by the doctrine of merger, than by keeping up incompatible relations.

In the *Touchstone* (p. 300) merger is treated as a surrender in law. When the immediate effect of a conveyance corresponds to a surrender, the instrument must be pleaded as a surrender, and not in the words in which the intention is expressed. In short, says Mr. Preston, there is not any case in which merger will take place, unless the right of making and accepting a surrender resides in the several persons between whom the transaction which causes the determination of one of these estates, takes place.

The effect of a surrender is not always the same as that of merger. If the lessee for life make a lease for years rendering rent, and afterwards the lessee for life surrender his estate; in this case, albeit the primitive estate for life be yielded up, yet the derivative estate for years shall continue notwithstanding; but the surrenderee shall not have the rent reserved upon the lease for years. So if lessee for life or years break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not thereby saved, for the lessor may have an action of covenant still, notwithstanding the surrender. (*Touchstone*, 301.) If, therefore, the lessee for life desires not only to surrender his estate to the lessor, but also to transfer the rent due and to become due to him from the tenant for years, there should not only be a surrender of the life estate, but an assignment to the primitive lessor of the lease for years. It is probable that a grant, under the revised statutes, by the tenant for life to the original lessor of all his estate in the premises, and of the lease for years granted by him, and the rent due and to become due thereon, would operate as a surrender of the primitive lease, and an assignment of the derivative one to the original lessor.

SECTION III.

Of the Extinguishment of the equitable in the legal estate, and of a simple contract in a specialty or judgment, frequently denominated Merger.

We have pointed out, in a previous section, the difference between *merger* and *extinguishment*, showing that the former relates to *estates* only, while the latter is a term of general application to rights as well as estates. The union of the legal and equitable estate in the same person and in the same right, operates as an ex-

tinguishment of the equitable estate. For the doctrine of merger, technically speaking, it is essential that the several estates consolidated by merger should be all legal or all equitable; and this whether the union be by act of the law or act of the party. (*Den v. Van Ness*, 5 *Halst.* 102.) Merger is a mode of extinguishment. The two are often confounded together; and our judges have not always been careful to distinguish the one from the other. They have frequently used indiscriminately the term merger and extinguishment as meaning the same thing. And they have generally denominated the union in one person of the equitable with the legal estate, as a merger of the former in the latter. In this sense a more enlarged and popular signification is given to the term merger, than is strictly appropriate. It does not, however, occasion any essential difficulty in the discussion of principles. Using the term, therefore, as our own judges have used it, we shall proceed to notice the application of the doctrine to the cases mentioned at the head of this section.

At an early day, the chancellor, in *Nicholson v. Hallett*, (1 *John. Ch.* 422,) said that it is a settled principle that when the legal and equitable estates, being coextensive, unite in the same person, the equitable estate is merged in the legal, and may be said no longer to exist for the purpose of being recognized and acted upon by the court. The legal estate is left to prevail according to the rules of law. Thus, if the legal estate in fee descends, *ex parte materna*, and the equitable estate in fee, *ex parte paterna*, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate. That the union of the legal and equitable estates in one person in the same right leads in general to the merger of one in the other, was the settled doctrine as well of the courts of law as of equity. (*Roberts v. Jackson*, 1 *Wend.* 484. *James v. Mowry*, 2 *Covey*, 246.) The term extinguishment is sometimes used, but not as conveying any different idea from that of merger.

The effect of the doctrine sometimes leads to an apportionment of an incumbrance. Thus, if a tenant in fee acquires a moiety of the rent and reversion, the lease and rent are merged *pro tanto*. (*Lansing v. Paine*, 4 *Paige*, 639.) On the same principle, if an undivided half of land upon which an annuity for A. is charged, is cast upon B. by descent, the half of the annuity chargeable upon his share of the land is thereby merged. (*Jenkins v. Van Schaick*, 3 *Paige*, 242.)

The doctrine under consideration is more frequently exemplified in the case of mortgage securities than in cases of landlord and tenant. The rule is inflexible, at law, that when a greater estate and a less meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated; or in the law phrase is said to be merged. This doctrine was applied to the vesting of a mortgage security in the owner of the equity of redemption. (*James v. Mowry*, 2 Cowen, 246.)

It becomes important, to those dealing with real estate, to know when, and under what circumstances, the rule of law will be relaxed and the equitable estate be permitted to subsist, notwithstanding its apparent union with the legal estate. At law, we have seen that the rule is inflexible that the equitable merges in the legal estate. In equity this rule is not inflexible, though in general equity follows the law in this respect.

The qualification of the rule by means of which courts of equity will keep alive a security, which, at law, would be merged or extinguished, depends on the concurrence of two things, 1, the intention of the party, and 2d, the existence of some fact or circumstance showing that it would be beneficial to the one party and not injurious to any body to continue it as a subsisting security. In *Gardner v. Adams*, (3 John. Ch. 53,) a party purchased the equity of redemption of certain mortgaged premises, and afterwards paid off the mortgage and took an assignment of it to himself. It thus became merged at law. He afterwards sold the premises to the defendant by a deed, with full covenants of warranty, seisin and against incumbrances; and at a later day, being still in possession of the mortgage, he assigned it to the plaintiff's intestate for a valuable consideration. The administrator sought to foreclose the mortgage, thus treating it as a subsisting security. This was resisted by the defendant on the ground that the mortgage had merged in the legal estate and was therefore extinguished. The defendant, in his answer, alleged that he purchased the premises with the full assurance that they were free from incumbrances, and had no knowledge or suspicion that the mortgage was a subsisting lien. The court held that there was no reason in the case for keeping the two estates distinct; and that the owner of the equity of redemption when he paid off and took an assignment of the mortgage, did so for the purpose of payment, and that the same was, by that act, extinguished. In this case it is obvious that had the court kept alive the security, it

would have been aiding one of the parties to practice a fraud on the other. Had the purchaser exercised more caution he would have caused a search to be made for incumbrances and had the mortgage discharged of record. That would probably have saved him from the litigation. He did no act, however, that deprived him of the benefit of the legal principle that the mortgage was merged.

The same doctrine was repeated in *Starr v. Ellis*, (6 *John. Ch.* 393.) The chancellor said that a court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and *just* intention of the party. It must at all events be an *innocent* purpose and injurious to no one.

This is the doctrine of the English courts of equity. In *Forbes v. Moffatt*, (18 *Ves.* 384,) the master of the rolls said "that a person entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. A court of equity will sometimes hold a charge extinguished when it would subsist at law; and sometimes preserve it, when, at law, it would be merged. In such instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and when this is the case, it will be held to sink, unless something shall be done by him to keep it on foot. If it be perfectly indifferent to the party whether the charge should or should not subsist, it sinks." (See also *Lord Compton v. Oxenden*, 2 *Ves. jun.* 261.)

The subject was again most thoroughly discussed by the counsel and the court, in the case of *James v. Mowry*, decided in 1823, in the late court of errors. (2 *Cowen*, 246.) That case came up on appeal from the court of chancery, where it had been decided by the late Chancellor Kent. (6 *John. Ch.* 420-434.) The doctrine of the two courts was not essentially variant on questions of law, as will be seen by comparing the several opinions delivered in the case. It must be considered as decisively settled in this case, that the doctrine of merger, as stated above at page 300, is the law of this state: that the rule is inflexible at law, but in equity is not so, but depends on the expressed or implied intention of the person in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence. If such person be an infant, or labor under any incapacity to make an election, a court of equity will keep the equitable estate on foot. So also when it is for the interest of the person in whom these estates unite, the law will imply an intention to prevent a merger, provided no injustice be done thereby to other parties.

It is not essential to the law of merger, as administered in this state, that the mortgagee should have acquired the legal title to the whole premises covered by the mortgage. If he purchases and takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*; and may be apportioned between the party as to which it is extinguished and the party in relation to which it exists. (*James v. Mowry, supra.*) This too is subject to the general rule, with respect to intention, convenience and interest of the parties. It is competent for the mortgagee to release to the mortgagor the equity of redemption to a part of the mortgaged premises, and leave the mortgage a subsisting security for the whole debt upon the residue. If such was the intention of the parties, it will be carried into effect. There need be no apportionment when the release is voluntarily given.

In equity a prior mortgage cannot be merged in the subsequently acquired legal title to the equity of redemption, where there is an intermediate mortgage. (*Millspaugh v. McBride, 7 Paige, 509. Skeel v. Spraker, 8 id. 182.*)

We shall bring this subject to a close by noticing some cases of extinguishment, frequently confounded with merger and called by that name, in addition to those already mentioned. This doctrine applies to the acceptance of a higher security by a creditor for his debt, by means of which the original demand is extinguished. Thus, if a creditor by simple contract accepts an obligation under seal for his debt, the original simple contract debt is thereby extinguished. The reason of this is that the obligation under seal is of a higher nature than the simple contract. (*The Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299.*)

It is on the principle of extinguishment, that a valid award made by arbitrators is a bar to a suit for the original cause of action. (*Coleman v. Wade, 2 Selden, 44.*)

In *Clark v. Rowling, (3 Comst. 216.)* it was held that a judgment upon a simple contract operated to extinguish it; but not so as to prevent a court of equity from looking behind the judgment and see upon what it was founded. The learned judge in this case applied the terms *merger* and *extinguishment*, indiscriminately, as descriptive of the effect of the judgment upon the simple contract.

Whether the debtor's promissory note will extinguish the original demand for which it was given, depends on circumstances. If it be

not negotiable, it is of no higher nature than the original demand. No extinguishment or merger can take place when both securities are of the same quality or degree. (*Hill v. Beebe*, 3 *Kernan*, 564.) This doctrine applies to chattel mortgages; one chattel mortgage is not an extinguishment of another. Nor is a judgment recovered on a covenant for the payment of rent an extinguishment of the rent, unless the judgment be satisfied. (*Chipman v. Martin*, 13 *John*. 240.) No other action could indeed be brought upon the covenant while the first judgment remains in force; and in this sense, the original cause of action is said to be merged or extinguished in the judgment. But the remedy by distress under the lease, while that remedy was in force, was of as high a nature as the judgment. It is still so now, though the remedy by distress is abolished; the land being in a measure still held for the rent.

When a collateral security, in the form of a note executed by a judgment debtor and his surety, is itself got into a judgment and collected of the surety on execution, the original judgment to which such note was collateral is thereby extinguished, and no effectual sale of the debtor's property can be made, even on an execution issued previous to the payment of the second judgment. (*Croft v. Merrill*, 4 *Kernan*, 456.)

The question sometimes arises, after a deed has been executed and delivered in pursuance of an executory contract, whether the latter is extinguished. If such contract provided only for the delivery of a deed, and it be made and delivered according to the terms specified therein, it is plain that the latter is discharged or extinguished. Full performance is all that can be required, and that is a satisfaction of the contract. But, it often happens, that the executory contract contains other stipulations, relative to collateral matters. These are not necessarily affected by the delivery of a deed. In *Witbeck v. Waine*, (2 *Smith*, 532,) the executory contract for the sale of land provided for an increase or rebate of the purchase money in proportion to any excess or deficiency which might exist in the quantity of the land; this was held to remain in force, after the execution and delivery of the deed. In *Bogart v. Burkhalter*, (1 *Denio*, 125,) the preliminary contract for the sale of land contained an agreement that the vendee should erect a particular description of building on the premises, and would not erect any thing thereon which should be a nuisance to the adjoining property. It was held

that the vendee could maintain an action for a breach of this agreement, though before the acts complained of he had conveyed the land to the vendee.

It is competent to the parties, in carrying out their executory agreement, to deviate from it ; to waive any of its stipulations ; and to substitute others. When a deed has been given in pursuance of a preliminary contract for the sale of the land, containing stipulations of which the conveyance itself is not the performance, it is, therefore, a question of intention whether the parties have surrendered those stipulations. In the absence of all proof, there is no presumption that either party intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction. In *Morris v. Whitcher*, (6 *Smith*, 41,) a stipulation in the executory contract that the vendor should retain possession for a specified period, was held not to be merged or extinguished by the conveyance, but admissible in evidence to qualify its operation, and to defeat an action for the possession by a subsequent grantee with notice. (*See also Drinker v. Byers*, 2 *Penn. R.* 528.)

SECTION IV.

Of the Circumstances indispensable to Merger.

The first circumstance which, from the terms of the definition, appears to be essential to a merger is, that there must be two or more *estates*, which meet in the same person, in the same lands, &c. or in some part of the same lands, &c. Unless there be at least two *estates*, there is no occasion for a merger. A mere *right* or *title*, it is said, will not suffice. The case put to illustrate this rule by Preston is, that if the discontinuance of an estate tail, by the granting an estate for life, by tenant in tail, and his death without issue, in the lifetime of the tenant for life, and the surrender by the latter to the person entitled under the remainder expectant on the estate tail, there can be no merger. But such a case cannot occur in our practice, and therefore the ingenious and subtle reasoning on which it depends need not be repeated.

The question will rarely arise whether a man has one estate or two estates in the same premises. But it has sometimes occurred. Thus in *Rosse's case*, a lease was made to A. and his assigns *habendum* to him for his life and for the lives of B. and C. The question was whether the grant during the life of B. and C. was void. The

objection was, that when a man has two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and, therefore, it was insisted that the estate for his own life and for the life of others could not stand together. But the court held that here was but one estate, which had this limitation, to wit: during his life and the life of two others, and he had but one freehold, and therefore there could not be any drowning of estates in the case, but he had an estate of freehold to continue during these three lives and the survivor of them.

In commenting on this case Mr. Preston says (3 *Conv.* 405,) that if the lease had been for the *several* lives, by way of distinct and successive estates, one of those estates might have merged in another of those estates. The ground of the decision was that the limitation for the several lives gave only *one entire estate*, and not several *and distinct estates*. The right of enjoyment for several lives may be limited to the same person by the same deed, and yet a merger may take place. Thus, says Preston, a lease to A. for the life of B., remainder to himself for his own life, gives several and distinct estates, and therefore and because an estate in remainder, which is for his own life, is a distinct estate, and larger than the estate for the life of B., the estate for the life of B. will merge in the estate of A. for his own life.

If Rosse's case had occurred in this state, under our existing laws, on the death of the tenant for life, the estate he held limited on the life of B. and C. would have gone to his personal representatives under the statute. (2 *R. S.* 82, § 6, *sub.* 1.) The estate would not have terminated on his death, as it would if the estates limited upon the life of B. and C. had been granted as distinct estates, by way of remainder, on the death of the tenant for life. In this latter case, as the several remainders would have merged in the estate for his own life, there would be nothing, after his death, to go to his personal representatives.

It is to be noticed, under this head, that the several estates must meet and vest in the *same person and in the same right*. Several estates in *distinct persons* will continue several and distinct interests.

The same effect will follow if the several estates be held by the same person in *different rights*. This embraces the case of trustee and *cestui que trust*, of executors and administrators, and of husband and wife.

In *Hadley v. Chapin*, (11 *Paige*, 245,) it was intimated that if

a mortgagee in trust acquires the equity of redemption, the mortgage is not thereby merged in equity. A court of equity will keep the security on foot, unless the purposes of justice require a union of the two estates.

In *Gage v. Acton*, (1 *Salk.* 326,) Lord Holt said that if a feme executrix of an obligee marries the obligor, that will work no extinguishment, because the husband is to receive it in *auter droit*; it would be a devastavit by construction of law, which, being a wrong, cannot be; so if a man hath a term in right of his wife, or as executor, and purchases the reversion, this is no extinguishment, because he hath the term in one right and the reversion in another. In that case the difference of the rights hinders an extinguishment, because a third person is concerned and may be prejudiced, which cannot be by act of law. In 3 *T. R.* 461, Lord Kenyon is reported to have said generally, without any distinction, that nothing is clearer than that a term taken *alieno jure* is not merged in a reversion acquired *suo jure*. This is the doctrine of Blackstone in 2 *Com.* 177. But the correctness of the above opinions is questioned by Mr. Preston, in his treatise on merger. (3 *Prest.* 277.)

With regard to husband and wife, it is laid down by Blackstone that if the reversioner marries the tenant for years there is no merger; for he hath the inheritance in his own right, the lease in right of his wife. (2 *Black. Com.* 177.) Mr. Preston, (*supra*,) denies this to be law, and cites a case where a married woman became entitled to a term as executrix, and the husband held the term in her right, and in right of her character of executrix, he purchased the inheritance; and it was held that the term was merged so as to be extinct as to the wife, if she survived, though in respect to all strangers it should be accounted assets in his hands. But it is believed that the law in this state is understood as expounded in Blackstone, and by Lord Holt and Lord Kenyon. In *Cooper v. Whitney*, (3 *Hill*, 95,) it was intimated by the judge that if the wife acquire an equity of redemption by deed, and the forfeited mortgage be assigned to the husband, there is no merger.

In *James v. Mowry*, (2 *Cowen*, 284 and 300,) the judges who delivered the prevailing opinions, cite the doctrine of merger from 2 *Black.* 177, without qualification. It was said also in that case that when it is for the interest of the person in whom the two estates unite to prevent a merger, the courts will keep both on foot. Under the statutes of this state, in relation to executors and adminis-

trators, and with respect to the rights of married women, it is believed that a married woman, acquiring a term as executrix, would still hold it on the death of her husband, though he purchased the inheritance in his lifetime.

A distinction is taken by Mr. Preston between a case in which an estate in one's own right meets in an estate in *auter droit*, occasioned by the *act of the law* or the *act of the party*. If the union is occasioned by the act of the law, he admits that no merger occurs; if by the act of the party, the two estates are said by him to merge. There are some cases referred to which justify this distinction.

It results from what has been said that an estate may merge for a *part* of the land; and continue in the remaining part of the land. The merger will not be more extensive than the particular part of the land in which there are several successive estates in the same person, without any difference whether the more immediate or the more remote estate comprises a larger portion of the lands. This doctrine of a merger *pro tanto* is expressly recognized by the court of errors, in *James v. Mowry*, (*supra*,) and by the chancellor in *Lansing v. Paine*, (*supra*.)

The law of merger may operate between three or more estates, as well as between two estates. If A. be tenant for life, with remainder to B. for life with remainder to A. in fee; here the intermediate estate of B. prevents the union of the several estates in A. This impediment being removed by B.'s conveying his life estate to A., the whole becomes one interest. A. is no longer a tenant for life, or a tenant *pur auter vie*, but a tenant in fee.

The next circumstance we shall notice is that the several estates must be immediately expectant on each other. The more remote must be without any intervening vested estate, and also without any intervening contingent remainder created in the same instant of time, and by the same means as gave origin to the other estates. (*Preston on Merger*, 107.) It is absolutely necessary that the latter estate should be connected with the former estate, and be immediately expectant thereon, so as to come into its place, on the determination of that estate.

One case to illustrate this is, if a man lease to one for ten years, and afterwards lease the same land for twenty years, and the first lessee purchases the reversion in fee, yet the first lease is not extinct, because the second lease, which is for twenty years, is mesne between

the first lease and the fee simple, which is an impediment to extinguishment.

If one of the mesne estates, where there are several, be greater in its quantity and extent than the estate by which it is followed, the operation of the doctrine must experience an interruption at this point. The doctrine must be stationary till the impediment shall be removed, either by the actual determination of this mesne estate, or by some change in the tenancy of the parties, which will afford room for the application of the leasing. This case is put by way of illustration. A. is tenant for 21 years, remainder to B. for life, remainder to A. for life, remainder to A. for 1000 years, remainder to D. in fee, and B. conveys his estate to A. As soon as this conveyance is made, first the estate from the life of B., and secondly, the estate for twenty-one years, will merge in the life estate of A. This is the *ne plus ultra* to which the doctrine can be carried under these circumstances of the tenancy. The next estate of A. is for years, and his estate for life is larger than, and prior to that estate, and for that reason cannot merge in the same; but suppose D. who is seised of the fee, to convey that estate to A. or to limit the same to him in tail, or to die leaving A. his heir; in either of these cases, the accession of the fee will operate to the merger and annihilation of the estate for one thousand years. By these means the estate of A. for his life, and his estate in fee, will become immediate to each other; and as the estate for life, or for years, is less than the estate in fee, the estate for life will merge in that estate. (*Preston on Merg.* 142.)

Another circumstance to be observed is, that the more remote estate must be as large as, or larger than the more immediate estate. Thus, where a man leases for a term of years, and afterwards takes an interest for term of life, to take effect immediately; there the lease for years is extinct. But where one leases to J. N. for term of life and twenty years over, then he shall have both estates. The reason is that the more remote estate is less than the estate for life. (*Preston on Merger*, 166.)

Under this head it will not be inappropriate to notice the gradation of estates. This has reference to their *quantity* as well as *quality*. With respect to quantity, the highest estate with us is a fee simple. This comprehends all other interests. The next in order are determinable fees, qualified fees, and conditional fees. There is no principle by which a superiority can be given to one of these last over the others, except where one of them is derived out of the other;

and thus the derivative interest must, of necessity, be the inferior estate.

Next follow estates for life; in which are included 1st. Estates for the life of the party; 2d, for several lives; 3d, for the life of another person; and 4th, for the joint lives of several persons. Next come estates for years which are all of the same nature; though they may be different in their extent. Then other chattel interests; and lastly estates at will.

Any estate of an inferior degree may, if the requisite circumstances concur, merge in one of a higher nature. A term of years derived by way of under lease, out of a term of years, may merge therein. And an estate for years may merge in a more remote term in remainder. (*Preston on Merger*, 169, 182, 201.)

PART III.

OF THE MODE OF ALIENATION OF REAL PROPERTY.

IN this branch of our treatise it becomes necessary to examine the various modes by which title to real estate is lost or acquired ; and of the various circumstances which occur in transmitting it from one person to another. It involves the consideration of the theory as well as the practice of conveyancing. This leads to the inquiry whether the property has been acquired by descent or purchase. It shows the necessity and points out the mode of preparing abstracts of title, and searching for incumbrances. And it gives the form in which these instruments of alienation are made. We shall treat of these subjects under the following heads, and reserve for the appendix the collection of various forms which are used in the conveyance of real property.

CHAPTER I.

OF TITLE TO THINGS REAL.

Most writers on the subject have adopted the definition of Coke ; (*Co. Litt.* 345 *b.*) *Titulus est justa causa possidendi quod nostrum est* ; signifying the means whereby a man has the ownership and possession of his property. This definition has reference not only to the instruments which convey, and afford the evidence of title, but those acts of possession and occupation which usually attend it. In this sense it embraces not only deeds, wills and other muniments of

ownership, but the actual and rightful enjoyment of property, whether gained by a written transfer from the rightful owner, by descent, or by long and uninterrupted possession.

The evidence by which the title of the claimant is established admits of various degrees, from the slightest presumption to the highest probability. The various stages in this evidence may be properly marked by considering first, simple possession ; second, right of possession ; and third, the right of property.

1. The lowest order of evidence, in this respect, is that which results from the actual possession. This may happen when one man unjustly expels another, or, in the language of the old cases, disseises him. It may occur when, on the death of the rightful owner, and before the entry of the heirs, a stranger abates, as it is termed, and holds out the heir. The evidence of title derived from bare naked possession is all the time increasing by the acquiescence or negligence of the rightful owner, until at length, it may ripen into an indefeasible right.

Until the true owner has asserted his right to divest this possession, such possession, as against all the rest of the world, affords *prima facie* evidence of a legal title to the possessor. It is sufficient to enable him to maintain an action against a trespasser who has no actual title to the land, or right of possession. (*Hyatt v. Wood*, 4 *John*. 157.) And trespass cannot be maintained against a stranger, except by the person who has the possession in fact of the land. (*Campbell v. Arnold*, 1 *id.* 511.)

This presumption in favor of the *actual* occupant rests on the well known feudal maxim, that seisin must be the basis of every title, except in the case of descent.

2. The next stage of a perfect title is a *right* to the possession. This right may be in one person, while the actual possession is in another. A tenant for a term of years may be turned out of possession by a naked trespasser. In this case, he who was expelled has the right of possession, which the law will protect, while a wrongdoer has the actual possession. This right of possession is either *apparent*, which may be rebutted by a better right ; or *actual*, which will be paramount to all other claims. There is much nice reasoning on this subject in the old English books, which has little or no application to our jurisprudence, at the present day.

3. The last ingredient of a perfect title is the *right of property*; the *jus proprietatis* of feudalism. This may exist in the original and rightful owner, after the right of possession has been gained by one party, and the actual possession by another. The distinction between the right of possession and the right of property, at the present day in this state, is followed by no practical consequence since 1830, when, by the revised statutes, the statute of limitations was fixed at twenty years, whether the remedy was brought to assert a mere right to the land, or a right to the possession of it. (2 R. S. 292, repealed by the Code, and the substance re-enacted, Code, §§ 75, 78, et seq.)

The union of the three preceding requisites are essential to a perfect title to lands, tenements and hereditaments, viz. the *actual* possession, the *right* to possession and the *right of property*. Lord Coke thus states the whole doctrine: "It is to be known that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of property and possession. For example, a man may be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis*." (Co. Litt. 266 a.)

The owner of real property who proposes to sell or mortgage, must, according to the English writers, be prepared to deduce his title to the possession of it during a period of sixty years at least, previous to such sale or mortgage. (Whart. Conv. 497.) This period was fixed with reference to the statute of limitations in England, which formerly required a period of sixty years to bar a writ of right. The act of 3 and 4 Will. 4, ch. 27, among other changes, reduced the period of limitations to twenty years, and abolished all the old real and mixed actions, except dower *quare impedit* and ejectment, and provided that where the remedy is barred by time, the right and title of the person in any land, rent, &c. whose remedy is thus taken away, is extinguished. This is said to be a great improvement, and very much assists titles depending upon non-claim. (Sugden's Vend. 613, 614.)

Opinions differed as to the reason of the rule fixing sixty years as the minimum extent to which abstracts of title should reach. If it depended *solely* on the analogy drawn from the statute of limitations it was supposed that a shorter period might be adopted. But the question has been conclusively settled in England by Lord Cotten-

ham, in the case of *Cooper v. Emery*, (1 *Phil.* 388,) that the period for which a good title is required to be shown is still sixty years, notwithstanding the statute of 3 and 4 Will. 4. In delivering his judgment the chancellor says: "It was supposed that by the operation of that act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on that subject; but after considering it I am of opinion that the statute does not introduce any new rule in this respect; and that to introduce any new rules, shortening the period, would affect the security of titles. One ground of the rule was the duration of human life; and that is not affected by the statute. It is true that in other respects the security of a sixty years' title is better now than it was before. But I think that is not a sufficient reason for shortening the period; for adopting forty years, or as it has been suggested by a high authority, fifty years instead of sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration." (*See Whart. Conv.* 498 and notes.)

In this country a less period than in England, of uninterrupted possession and enjoyment of land, will afford the requisite evidence of ownership. In most, if not all the states, grants have been very freely presumed upon proof of an adverse, exclusive and uninterrupted enjoyment of twenty years; it being the policy of courts of law to limit the presumption to periods analogous to those of the statute of limitations, in all cases where the statutes do not apply. (2 *Greenl. Ev.* § 539.)

But this branch of the subject will be resumed under a subsequent head, and need not be further noticed in this place.

It remains to consider the *modes* of acquiring a title to real property. These are two: by *descent* and *purchase*. In the former the title is vested in a person by the operation of law, and the latter by the act and agreement of the party. (*Co. Litt.* 18 b.) This distribution is sufficient for all practical purposes, though as a definition, it is open to criticism. (*Hargrave's note* 106 to *Co. Litt.* 18 b.)

CHAPTER II.

OF TITLE BY DESCENT.

Having shown in the preceding chapter, the nature of title to things real, and that the modes of acquiring it might be substantially reduced to two, we propose now to consider that species of title which is derived by descent.

Descent is the title whereby a person, on the death of his ancestor, acquires his estate as his heir at law. The heir therefore is the person upon whom the law casts the estate immediately on the death of the ancestor.

The English law of descents is derived, it is said, from feudal principles, and differs essentially from the Roman law of succession. It contains a number of rules, or canons, which if they were ever in force in this state, have been greatly modified, and in some instances repealed. The rules of descent in this state depend mainly on our statute, which adopts only such parts of the common law as it does not repeal. (1 R. S. 750.)

The law of descent has reference only to real estate, and not to personal. The former, if not disposed of by devise, descends to the heirs; the latter vests at the death of the owner, in his personal representatives. If not bequeathed by will, it is to be distributed among the next of kin of the last possessor, according to the statute of distributions. The next of kin may be the same persons as the heirs at law, and may embrace some persons who would not take by descent.

Not only every thing which falls under the denomination of real estate descends to the heirs, but also *heir looms*, and all such other chattels as are annexed to or connected with the freehold; as wain-scots, benches, doors, windows, charters, deeds and other evidences of the title, together with the chests and boxes in which they are contained. Enough has been said on this subject in a former chapter. (*See ante, Part 1, ch. 2.*)

Trees, whether timber trees or not, if standing on the land at the death of the ancestor, together with the grass annually growing, though ripe for cutting, descend with the land to the heirs. But such vegetables and growing crops as are produced annually by labor and cultivation, such as potatoes, corn and the like, go to the personal representa-

tives. The inquiry, as to what descends to the heir, and what passes to the executors or administrators, has often led to much controversy. As between the heirs and the executors or administrator, the rule in favor of the inheritance obtains with the utmost rigor; and things annexed to the freehold will descend to the heir, which as between landlord and tenant, if annexed by the latter for purposes of trade, would be treated as personal property. (*Elves v. Maw*, 3 East, 38. *Amos & Ferard on Fixtures*, ch. 2, §§ 3, 4. *Cresson v. Stout*, 17 John. 116. *Holmes v. Tremper*, 20 id. 29. *Reynolds v. Shuler*, 5 Cowen, 323.)

The doctrine of descents also often gives rise to the inquiry who were the heirs on whom the law devolves the estate. These may be, under the laws of this state, the lineal descendants, or the ancestor of the person last seised, or the collateral kindred of the latter, if there be none in the other class entitled to inherit. The lineal relationship has reference to persons of whom one is descended from the other, as father or mother, grand parents, &c. in the ascending line; or children, grandchildren, great-grandchildren, in the descending line. *Collateral* consanguinity is that which subsists between persons descended from a common ancestor. Thus brothers are collaterally related to each other. The like is true of their respective offspring. Also uncles and aunts and their descendants are collaterally related.

In this state, the method of computation is according to the rule of the civil law, by which in the ascending and descending line each generation constitutes a degree. Thus from the father to the son is one degree, to the grandson two degrees, and so on *ad infinitum*, whether ascending or descending. The rule is the same in this respect as in the canon law. But in computing the relationship of collateral kindred, the civil law and canon law differ. By the canon law the computation is made by counting only from the common ancestor to the party most remote from him, if the line is unequal, or to either party if they are in equal degree. The civil law, which we follow in this respect 'unless when altered by statute, counts from the *propositus* up to the common ancestor, and then downwards to the other party in question, reckoning a degree for each generation. This subject will be again resumed.

The law of descents involves also an inquiry, as to the *persons* capable of inheriting. At common law the persons claiming by de-

scent must be, 1st, *legitimate*; 2d, natural born or naturalized, or made *denizens*; and 3d, not attainted of felony.

No person could claim as heir by descent who was not born in lawful matrimony. A bastard being *filius nullius*, could neither inherit from father or mother. (*Cruise's Dig.* title 29, ch. 2.) It will be seen, when we come to examine the rules of descent, that the term *heir* includes other persons besides descendants. At present we are only speaking of the descendants of the intestate, and not of the other person on whom the law casts the estate on failure of lineal descendants. This rule of the common law of excluding children and relatives who are *illegitimate* from inheriting, is broken in upon in this state by the act of 1855, chapter 574. By that act illegitimate children, in default of lawful issue, may inherit real and personal property from their mother as if legitimate. The law was prospective in its operation and was not to affect any right or title in or to any real or personal property already vested in the lawful heirs of any person theretofore deceased. (3 *R. S.* 43, 5th ed.) This statute does not prevent illegitimacy from being an interruption to the rule of descent, except in the single case for which it provides; that of a bastard from its mother in case she has no legitimate issue. The illegitimate offspring, if there be more than one, cannot inherit from each other, nor from their putative father, or his relatives, or the relatives of their mother. In all respects, save the case specifically provided for, the rule is that illegitimates are not entitled to inherit, under any of the provisions of the act. (1 *R. S.* 754, § 19.)

It is not essential that the heir should be born during the lifetime of the parents. Our statute expressly provides that descendants and relatives of the intestate, begotten before his death, but born thereafter, shall, in all cases, inherit in the same manner as if they had been born in the lifetime of the intestate and survived him. (*Id.* § 18.)

We have already alluded to the disability of aliens with respect to their obtaining a title by purchase, and have shown what provision is made in their favor in this respect, when they have made a deposition or affirmation, in writing, of their residence and intention always to reside in the United States, and to become citizens thereof as soon as they can be naturalized, and that they have taken the incipient measures required by law to enable them to obtain naturalization. (*Ante*, Part 1, ch. 1, § 2.) It remains to inquire into their right to take by descent.

At common law an alien cannot take by descent. Nor could a natural born or naturalized citizen take by descent if he had to trace his descent through an alien ancestor. In England the statute of 11 and 12 Will. 3d, ch. 6, removed the common law disability of claiming title through an *alien* ancestor, but did not apply to a *living alien ancestor* so as to create a title by heirship, where none would exist by the common law, if the ancestor was a natural born subject or citizen. (*McCree's Lessee v. Somerville*, 9 Wheat. 354. *The People v. Irvin*, 21 Wend. 128.) Hence the nephew could not inherit from the uncle, if he had to derive his title through a living alien ancestor; as the nephew does not inherit directly from the uncle, but must derive title from the common stock. (*Id.*) The act of 11 and 12 Will. 3d, was not re-enacted in this state until the revision in 1830. (1 R. S. 754, § 22. *Jackson v. Green*, 7 Wend. 333, 339. *Jackson v. Fitzsimons*, 10 id. 9. *Banks v. Walker*, 3 Barb. Ch. 438. *McCarthy v. Marsh*, 1 Seld. 262. *McLean v. Swanton*, 3 Kern. 535.)

The laws of this state have lessened the disability of alienage in favor of actual residents who have taken the incipient steps to be naturalized. Thus, by the revised statutes, (1 R. S. 720, § 15, as amended in 1834, ch. 272; 3 R. S. 5,) it is enacted that any alien who has come or may hereafter come into the United States, may make a deposition or affirmation in writing that he is a resident of, and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require, to enable him to obtain naturalization, which is required to be filed and recorded by the secretary of state in a book to be kept by him for that purpose. And the next section provides that, the alien having complied with the foregoing, he shall thereupon be authorized and enabled to take and hold lands and real estate of any kind whatever, to him, his heirs and assigns forever; and may, during six years thereafter, sell, assign, mortgage, devise, and dispose of the same in any manner as he might or could do if he were a native citizen of this state, or of the United States, except that no such alien shall have power to lease or demise any real estate which he may take or hold by virtue of this provision, until he becomes naturalized. (*Kennedy v. Wood*, 20 Wend. 233.)

Various statutes have been passed at different times, some in relation to individuals, and others of a limited character, with respect

to the disability of alienage; and all tending to mitigate the rigor of the common law. It cannot be expected that these various enactments should be inserted in this treatise. Parties deriving title under them will be able to refer to them, and others have little or no interest in them.

The act of 1845 went farther towards removing the disability in question than any previous general law, and was for the benefit of resident aliens indiscriminately. The first section provides that any alien resident of this state, who has heretofore purchased and taken a conveyance of any lands or real estate within this state, or to whom any lands or real estate have been or may hereafter be devised, before making and filing in the office of secretary of state the deposition or affirmation in writing, specified above, may, on making and filing such deposition or affirmation, hold the real estate granted, conveyed or devised to such alien, in the same manner and with the like effect as if such alien, at the time of such grant, conveyance or devise, were a citizen of the United States. (*Laws of 1845, ch. 115. 1 R. S. 6, 5th ed.*) Though this section does not authorize the alien to take by descent, it enables him to acquire real estate by purchase, and imparts to him a capacity to transmit it to his heirs by descent or otherwise. This is obviously included in the authority to hold it *in the same manner as if he were a citizen of the United States.*

The fourth section goes a little further, and enables those who on his death would, according to the statutes of this state, answer the description of heirs of such deceased alien, whether they are citizens or aliens, to take and hold as heirs of such deceased alien, as if they were citizens of the United States, the lands and real estate of such alien at his death, in the like manner as if such alien, at his death, were a citizen of the United States. But if any persons answering the description of heirs to such alien, are males of full age, they shall not hold the real estate hereby made descendible to them as against the state, unless they are citizens of the United States, or, in case they are aliens, unless they make and file in the office of the secretary of state the deposition or affirmation before mentioned. (*3 R. S. 7, 5th ed.*)

This statute removes, to a great extent, the disability of alienage, and enables the persons who comply with its terms and fall within its provisions to take by descent from an alien as if they were citizens of the United States. (*Brown v. Sprague, 5 Denio, 550, 551, per Beardsley, J.*)

A person duly naturalized according to the provisions of the act of congress to establish a uniform rule of naturalization and the acts amending the same, has the like capacity to take and transmit real estate, as a native born citizen. (3 *Laws of U. S.* April 14, 1802, ch. 28, p. 475. *Jackson v. Green*, 7 *Wend.* 333.) If the alien has previously obtained real estate by purchase, by becoming a citizen at any time before office found, his title, even as against the state, is confirmed. (*The People v. Conklin*, 2 *Hill*, 67.)

It need not appear by the record, that all the preliminary requisites to a naturalization were complied with. The judgment of the court admitting the alien to become a citizen, is conclusive evidence upon that point. (*Ritchie v. Putnam*, 13 *Wend.* 524.) If a record of naturalization is valid on its face, it is conclusive. (*Banks v. Walker*, 3 *Barb. Ch.* 438.)

With respect to the children of such persons as are naturalized under the act of 1802, it is provided that if they are dwelling within the United States, and within the age of twenty-one years, at the time of such naturalization, they are considered as citizens of the United States. The act of congress is held to be prospective. (*West v. West*, 8 *Paige*, 435. *Peck v. Young*, 26 *Wend.* 613.)

In England, it is said that if an alien be made a *denizen* by the king's letters patent, and afterwards purchase lands, his son, born before his denization, cannot inherit those lands, but a son born *after the denization*, may inherit them, even though his elder brother be living. (1 *Bl. Com.* 374.) But there is no such class of persons in this state as *denizens*.*

The act of 1845, before cited, in the 8th section, provides that all aliens who shall hold any real estate by virtue of any of its provisions, shall be subject to duties, assessments, taxes and burdens, as if

* A *denizen* is an alien born, who has obtained, from the king, letters patent to make him either permanently or for a time, an English subject. He occupies a middle state between an alien and a natural born subject, and partakes of both of them. He may take lands by purchase or devise, but cannot take by inheritance. (1 *Black. Com.* 374 and note. *Burrill's Law Dict.* word *Denizen*.) According to Lord Coke, a person born within the king's liegance is called sometimes a *denizen*: In acts of parliament, *denizen* is taken for alien born, who is *denized* by letters patent, granted by the king. (*Co. Litt.* 129 a.) This last is the usual meaning of the term, and it is never used as synonymous with citizen or subject. (*Lessee of Levy v. McCarty*, 6 *Peters*, 117, note. 8 *T. R.* 31. 1 *B. & P.* 430.) A *denizen* can hold no office civil or military. (1 *Bl. Com.* 374.) His legal *status* is more like that of the emancipated slaves, in those states where they are not treated as citizens, than that of natural born or naturalized citizens.

he were a citizen of the United States ; but shall be incapable of voting at any election, or of being elected or appointed to any office, or of serving on any jury.

A person attainted of treason or felony was at common law incapable of taking by descent, or of transmitting his estate to his heirs. Such attainder operated as an extinction of his civil rights and capacities, which took place on pronouncing sentence of death. (4 *Bl. Com.* 380.) He is from that moment treated as dead in law. (*Id.* and 2 *id.* 251.) The constitution of the United States forbids the passage of any bill of attainder ; and provides that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. (*Const. U. S. art.* 2, § 9, and *art.* 3, § 8.) This state, during the revolution, on the 22d October, 1779, (1 *Greenl.* 26,) attainted fifty-nine persons, who had been prominent subjects in the colony, and many of them high officers in the government, and confiscated their estates and vested the same in the people. The same act banished the said persons from the state, and directed that if any of them should be afterwards found in the state they should suffer death, as in cases of felony, without benefit of clergy.

The existing law of this state provides that whenever any person shall be outlawed upon a conviction for treason, the judgment thereupon shall produce a forfeiture to the people of this state, during the lifetime of such person, and no longer, of every freehold estate in real property, of which such person was seised in his own right, at the time of such treason committed, or at any time thereafter ; and of all his goods and chattels. (2 *R. S.* 656, § 3.) A person sentenced to imprisonment in a state prison for life, shall thereafter be deemed civilly dead. (*Id.* 701, § 20.) Of course he cannot afterwards take by descent, or be the medium through which others may trace their title.

CHAPTER III.

OF THE RULES OF DESCENT.

The constitution of 1777 adopted such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New-York, as to-

gether formed the law of the colony on the 19th April, 1777, as the law of this state, subject to such alterations and provisions as the legislature of the state should, from time to time, make concerning the same. This feature of the first constitution has been preserved and re-adopted in each of the subsequent constitutions of the state, and is still a part of the organic law. The common law of England with regard to descents, with its doctrine of primogeniture, preference of males over females, exclusion of the half blood, and its various other provisions, was the law of the colony, until altered by the act of the 12th July, 1782; which latter act was revised and repealed on the 23d February, 1786. (1 *Greenl.* 205.) This latter statute still required the heir to be the *heir of the person last seised*, and the inheritance was then directed to descend 1, to his lawful issue, standing in equal degree, in equal parts as tenants in common; 2, to his lawful issue, and their descendants, in different degrees, according to the right of representation; 3, to the father; 4, to brothers and sisters; 5, to the children of brothers and sisters. In all cases of descent beyond those five cases, the common law controlled. The foregoing, it will be seen, abrogated the law of primogeniture, and the preference of males to females, and the exclusion of the parents on failure of lineal descendants, and constituted them, in a certain order, heirs to their own children.

The law thus remained in this state until the revision of the statutes in 1830, when important changes were introduced. All the decisions of the courts of this state, prior to 1830, with respect to the transmission of real estate by descent, were made either with reference to the common law, or that law as modified by the acts of 1782 and 1786. Some cases, arising under the former law, were not the subject of adjudication until after 1830, and were determined according to the principles of the statutes in force at the time the respective cases arose. So long a period has elapsed since the act of 1782, that no case can be expected to arise depending wholly upon common law principles. And the period of thirty years and upwards, which has transpired since the revised statutes took effect, has made it needless to devote much time to a consideration of the state of the law antecedently in force.

The act of 1786 adopted the maxim of the common law, which had subsisted for ages, that lands in fee simple must descend to the heir of the person *last actually seised thereof*. Coke, in his commentary on the 8th section of Littleton, p. 15 a, states the law to

be, that if the father make a lease for years, and the lessee entereth and dieth, and the eldest son dieth during the term, before entry and receipt of the rent, the youngest son of the half blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heir. But, he observes, in the case aforesaid, if the father made a lease for life, or a gift in tail, and dieth, and the eldest son dieth in the life of a tenant for life, or tenant in tail, the younger brother of the half blood shall inherit, because the tenant for life or the tenant in tail is seised of the freehold, and the eldest son had nothing but a reversion expectant upon that freehold or estate tail, and therefore the youngest son shall inherit the land, as heir to his father who was last seised of the actual freehold. (3 *Co. Rep.* 42, *Radcliff's case*.) This is the language of Spencer, J. in *Jackson v. Hilton and others*, (16 *John.* 99,) a case which arose under the common law, before it had been affected by the act of 1782 or 1786. In that case the testator, by his will, dated 1755, devised certain real estate to his daughter, without making any disposition of the reversion. The testator died, leaving B. his heir at law, who died before the termination of the life estate. It was held that the heirs of B. were not entitled as such to the land after the death of the tenant for life; for the reason that B., the son, had not such seisin as to create a new stock of descent; and a person claiming the land by descent must entitle himself as heir of the devisor who was last actually *seised* in fee.

In the case of *Jackson v. Hendricks*, (3 *John. Cases*, 214,) the same doctrine was recognized. In that case Esther Hendricks died seised of real estate in 1775, leaving a husband and two sons and three daughters; the husband became seised by the curtesy until his decease in 1793; the eldest son died in 1784, intestate, and without issue; the youngest son entered after the death of his father; the sisters brought their ejectment, and the court held that the case was governed by the common law, and the statute of descents did not apply, (*Act of 1786*;) that the descent to the eldest son was suspended by the existence of the estate of the tenant by the curtesy, and the eldest son was not seised so as to form a new stock of descent, or to constitute a *possessio fratris*; and that the mother was the person last seised, from whom the descent must be claimed; and as she died before the statute of descents, (*Act of 1786*,) her surviv-

ing son was adjudged to be entitled to the estate, to the total exclusion of his sisters. The same doctrine was held in *Bates v. Shraeder*, (13 *John*. 260.)

The *possessio fratris* is an expression found in the old books, and is used to denote the doctrine, which prevailed at common law, of the exclusion of the half blood from the succession to estates. The maxim was that the brother's possession of an estate in fee simple, makes the sister to be heir. This is best illustrated by Blackstone. (2 *Black. Com.* 227.) If a father have two sons, A. and B., by different wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue; still B. shall not be heir to this estate, because he is only of the half blood to A. the person last seised; but it shall descend to a sister (if any) of the whole blood A; for in such cases the maxim is that the seisin or *possessio fratris facit sororem esse hæredem*. Yet, had A. died without entry, then B. might have inherited; not as heir to A., his half brother, but as heir to the common father, who was the person last actually seised. This was the common law. It is, however, not now law in England, it having been recently abolished by 3 and 4 Will. 4th, and it is not law in this state, as we shall see when we come to examine the present law of descent as prescribed by the revised statutes of 1830.

Before we proceed to examine the several rules or canons of descents, a few more observations will be added. If the next heir of the person last seised be an alien, the lands do not escheat, but go to some remoter heir who is capable of taking by descent. (*Leyman v. Abeel*, 16 *John*. 30.)

The same rule of descent which governs in the case of corporeal hereditaments governs also in the case of incorporeal hereditaments. They are real property, and are subject to the like rules. (*Id.*)

A person who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, when the estate is acquired by purchase, as will constitute him a *stirps* or stock of descent. (*Wendell v. Crandall*, 1 *Comst.* 491, affirming *Vanderheyden v. Crandall*, 2 *Denio*, 9.)

The rule that the descent between brothers is immediate, and not impeded by the alienage of their father, holds between one of them and the representatives of the other, and also between the repre-

sentatives of both of them. Hence the alienage of the common grandfather does not impede descent between cousins, the children of brothers who were citizens, and capable of transmitting by descent. (*McGregor v. Comstock*, 3 *Comst.* 408.) In that case the death of the ancestor occurred prior to 1830.

We will now proceed to examine the rules or canons of descent, as they are prescribed by the revised statutes, and shall have occasion to compare them with those antecedently in force.

The general requirement of the law is that the real estate of every person who shall die without devising the same, shall descend in the manner following : 1. To his lineal descendants. 2. To his father. 3. To his mother ; and 4. To his collateral relatives ; subject in all cases to the rules and regulations prescribed in the act. (1 *R. S.* 751, § 1.)

I. The first rule or canon of descents is that if the intestate shall leave several descendants in the direct line of lineal descent, and all of equal degree of consanguinity to such intestate, the inheritance shall descend to such persons in equal parts, as tenants in common, however remote from the intestate the common degree of consanguinity may be. (*Id.* §§ 2, 17.)

This is the same as the first canon under the act of 1786, with the exception that the latter act applied only to cases of the death of the party last *seised*, leaving other cases when the ancestor had been disseised, or his right was contingent or executory, to be determined by the rules of the common law. The cases cited on a preceding page afford apt illustrations of the effect of that provision.

The rule at common law, as laid down by Blackstone, Cruise and the other approved English writers, was, that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum* ; but shall never lineally ascend.

The original rule, it will be perceived, required that the ancestor had no capacity to transmit the descent to his heirs, unless he was the person *last seised* of the actual freehold and inheritance.

The nature of seisin, and the difference between a seisin in *law* and a seisin in *deed*, have been explained in a previous chapter. Where a person acquired a fee simple in lands by descent, he acquired only thereby a seisin in law, and could not, on his death before entry, transmit the estate to his heir. It was necessary, at common law, that he should make an actual entry, so as to acquire

a *seisin in deed*, before he had such a title as would pass by descent to his heir. In this country no actual entry by the heir is necessary when the ancestor dies *seised*.

There were some exceptions to the common law rule. 1. When the ancestor acquired the estate by his own act, he was, in many cases, allowed to transmit it to his heirs, though he never had the actual *seisin* of it himself. In the case of an *exchange*, if both parties died before either entered, the exchange was totally void: but if one of the parties entered, and the other died before entry, his heir might enter and be in by descent. (*Shelley's case*, 1 Co. 98 b.) *Trust estates* and *equitable interests* might be transmitted to the heir, without an actual entry. Such is undoubtedly the rule with us at this day.

It was a maxim of the common law, that the freehold should never, if possible, be in abeyance. The lands, therefore, on the death of the party, immediately descend to the person who is heir at the time of the death of the ancestor. But this descent might be defeated by the subsequent birth of a nearer heir. This is now provided for by the statute. Descendants and relatives of the intestate, begotten before his death but born thereafter, in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. (1 R. S. 754, § 18.) This is not confined to lineal descendants, but extends to collaterals. A child begotten but not born, is for all purposes under the law of descents, treated as in being. Thus should the intestate die without lineal descendants, leaving nephews and nieces for example as his heirs, a nephew or niece, begotten *before* but born *after* the death of the intestate, would share equally with his or her brothers and sisters in the inheritance.

The rule in the first canon of descents at common law, excluding parents and all lineal ancestors from the inheritance of their offspring, is derived from the feudal law. It was first broken in upon in our act of 1786 in favor of the father, unless the inheritance came to the child from the mother, in which latter case it was left to descend as if the person last seised had survived the father.

The immediate descent to the children is, in certain cases, suspended. By the act of 1860, ch. 90, § 11, it is enacted that at the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seised, and all the rents, issues

and profits thereof during the minority of the youngest child, and one third thereof during his or her natural life.*

II. The second rule, as established by the revised statutes, is that if any of the children of the intestate be living, and any be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died, as tenants in common; so that each child who shall be living, shall inherit such share as would have descended to him, if all the children of the intestate who shall have died leaving issue, had been living; and so that the descendants of each child who shall be dead shall inherit the share which their parent would have received if living. (1 R. S. 751, §§ 3, 17.)

This is the same as the second canon in the act of 1786, except the latter derived the descent from the person *last seised*, of which enough has been already said. The revised statutes speak only of the *intestate*, and do not require an actual technical seisin in the ancestor to enable him to transmit the estate to his heirs.

The second canon at common law was, "That the male issue shall be admitted before the female." And the 3d canon was, "That when there are two or more males in equal degree, the eldest only shall inherit." These two rules giving the preference to the males, and establishing the rule of primogeniture, we have already said, were abrogated by our statutes at an early day. They have probably been repudiated in all the states in the Union whose jurisprudence was derived from the common law.

* This act is strangely defective, and will in some cases lead to the grossest injustice. Thus, should the mother die, in the lifetime of the father, leaving one or more infant children, and should the father marry another woman and then die himself, the second wife would, by virtue of the above act, hold, possess and enjoy all the real estate of which her husband died seised during the minority of the youngest child, without any liability on her part to support those children. The widow is not bound to support the minor children of her deceased husband by a former wife, any more than the husband is bound to maintain his wife's child by a former husband. (*Gay v. Ballou*, 4 Wend. 403.) There is less reason for a liability in the first case than in the last. It was a strange oversight in the legislature to give the mother in law all the estate, and leave the children of the deceased husband destitute. The only remedy, as the law stands, is for the husband to make a will and not die intestate.

Again, this statute only applies to the cases where the husband *died seised*, and does not extend to cases where there is an outstanding life estate, nor where there is an outstanding contingent remainder or executory devise, and he dies before the termination of the preceding estate. The legislature has used the language of the law of 1786, in preference to that of the revised statutes of 1830.

Both the doctrine of primogeniture and the preference of males to females are of feudal origin.

The *second* rule, as adopted by the revised statutes, applies to descendants of the intestate entitled to share in his estate, but who are of unequal degrees of relationship to him. Those nearest of kindred to him take the same shares that they would if those who have died leaving children had survived; and the issue of the deceased take the share that would have fallen to their ancestor. Thus, if a father dies, leaving one son, and two grandsons, the children of a deceased son or daughter, the son takes one half the estate by descent, and the grandsons the other half, being one quarter to each; and all as tenants in common. If one of these grandsons shall have died leaving two sons or daughters, in the case supposed, the latter will take only the share which would have belonged to their father, as tenants in common: That is to say, one quarter to be divided between them, being one eighth to each. They inherit, in this case, *per stirpes*, or by representation; so that the offspring take only the share which would have belonged to their ancestor, had he been living. (1 R. S. 751, § 4.)

If all the descendants were in equal degree of consanguinity to the intestate, they would take *per capita* under the first rule. Thus, if the intestate leaves twenty grandchildren, and no other lineal descendant, though there may be some of them the children of a son and others of a daughter of the intestate, they take by direct descent from their grandfather, in equal parts as tenants in common, *per capita*, and not by representation. If the intestate had four children, one of whom had two children, another five, another six, and another seven, making twenty grandchildren in all; and if their parents be all dead before the death of the intestate, in that case these twenty grandchildren succeed to the estate as tenants in common, each having a twentieth part of it. (*Pond v. Bergh*, 10 Paige, 140. 1 R. S. 751, § 4.)

This second rule of descent which we have been considering, comprehends within it all that is valuable in the fourth canon of descent at common law. That canon was: That the lineal descendants *in infinitum* of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living. Under this rule, according to the English law, the child, grandchild or great-grandchild, whether

male or female, of the eldest son, succeeded before the younger son or the daughters. (*Whart. Con.* 517.) This is thus illustrated by the same author: If a man have two sons A. and B., and A. dies leaving two sons, and then the grandfather die; now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left two daughters only, they would have succeeded to moieties of the whole in exclusion of B. and his issue. Under our rule, in the case supposed, the two sons A. and B. would take in equal parts as tenants in common; and if A. had left two daughters only, they would have taken, as tenants in common, one half of the estate, and B. the other half.

III. The third canon or rule of descents established in this state, transmits the inheritance of the intestate, in case of his death without lawful descendants, to the parents, first to the father, and in default of a father capable of taking, then to the mother; in both cases under certain limitations prescribed by the act.

This rule was an innovation and great improvement upon the former act, and still more so upon the English rule of descent, which excluded both the parents altogether.

The statute of 1786 provided that if the person *last seised* should die without lawful issue, leaving a father, then the inheritance should go to the father of the said person so seised, in fee simple; unless the said inheritance came to the person so seised, from the part of his or her mother, in which case it should descend as if such person so seised had survived his or her father. (1 *R. L.* of 1813, p. 53.) But the act of 1786 made no provision for the inheritance passing to the mother in any event.

In considering this rule of descent, which was new in our jurisprudence, and a departure from the common law, it is proper to consider its bearing upon each of the parents separately.

1. *Upon the father.* The revised statutes under which the third rule is deduced, transmit the inheritance of the intestate to the father, in default of lawful descendants, unless it came to the intestate on the part of his mother, and such mother be living; but if such mother be dead, the inheritance, descending on her part, goes to the father for life, and the reversion to the brothers and sisters of the intestate, and their descendants according to the law of inheritance, by collateral relatives before provided; if there be no such brothers, or sisters, or their descendants living, such inheritance descends to the father in fee. (1 *R. S.* 751, § 5.)

In the first case, the father takes the inheritance in fee ; and in the second, he takes only a life estate, and the reversion passes to the collateral relatives of the intestate and their descendants. If there be no such collateral relatives or their descendant living, the inheritance goes to the father in fee. In this latter case, the inheritance which came to the intestate on the part of the mother is diverted into another line of descent from that which it followed before the revised statutes.

2. *Upon the mother.* On the death of the intestate without descendants, leaving no father, or leaving a father not entitled to take the inheritance under the fifth section, and leaving a mother and brother or sister, or their descendants, then the inheritance descends to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the law of inheritance, provided in subsequent sections. If, however, the intestate in such case shall leave no brother or sister, nor any descendant of a brother or sister, the inheritance descends to the mother in fee.

The operation of the foregoing rules is more favorable to the father than the mother. The father takes an estate in fee, in preference to the brothers and sisters of the intestate or their descendants, but the mother, under the like circumstances, takes only a life estate, with a reversion to the brothers and sisters of the intestate who are living, and the descendants of such as may be dead. In the absence of brothers or sisters of the intestate, or their descendants, she takes the fee simple. In this respect she is put in the same situation of the father under the same circumstances, in relation to an inheritance coming to the intestate on the part of his mother.

These provisions are far more consonant to our notions of justice than those of the law of 1786, and greatly to be preferred to the seven rules of the common law. Rules somewhat analogous to the foregoing have been adopted in the other states, but it does not fall within the compass of this treatise to arrange them in order. These rules have now been in operation in this state for over thirty years ; have met with the approbation of the public, and have led to no serious controversy.

The tendency of our legislature for the last few years has been to mitigate those parts of our jurisprudence having their origin in feudal principles, which bore with unjust severity upon females. The acts of 1848 and 1849 relative to the separate right of married

women, and that of 1860, chapter 90, all of which have been already adverted to, are the offspring of that policy.

The statute does not extend the rule to the grand parents, who therefore do not succeed on failure of the parents or other kindred of the intestate. At common law they could not inherit from their grandchildren, and the law in that respect is unaltered.

IV. The fourth rule or canon of descents is, that if there be no lawful descendants of the intestate, and no father or mother capable of inheriting the estate, it descends, in the cases thereafter specified, to the collateral relatives of the intestate; and if there be several such relatives all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. (1 *R. S.* 752, § 7.)

If all the brothers and sisters of the intestate be living, the inheritance descends to such brothers and sisters; if any of them be living, and any be dead, then to the brothers and sisters and every of them who are living, and to the descendants of such as shall have died; so that each brother or sister who shall be living shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate, who shall have died leaving issue, had been living; and so that such descendants shall inherit the share which their parent would have received, if living. (*Id.* § 8.)

This rule embraces the whole, or parts of the third, fourth and fifth rules of the act of 1786, with modifications. It takes the place of the fifth case of the common law, which was broader; that on failure of lineal descendants or issue of the *person last seised*, the inheritance shall descend to his collateral relatives, being of the blood of the first purchaser, subject to the three preceding rules.

The great principle of the common law on which the doctrine of collateral inheritance depends, is, according to Blackstone, Cruise, and the other systematic writers on the subject, that upon failure of issue of the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law, to have originally descended. Instead of searching for the first purchaser, the New York rule seeks to continue the estate in the family of the intestate. It gives a paramount importance to proximity of kindred. It shows no preference to males over females, and disregards entirely the doctrine of primogeniture.

Under the former statute the supreme court held, in *Jackson v. Thurman*, (6 John. 322,) that in the case of lineal descendants of the person last seised, if all the descendants were of equal degree of consanguinity to him they should take equally, however remote they might all be from him. And if any of that class had died leaving issue, that such issue should take as the representatives of the deceased relatives of that class. But in relation to collateral heirs, a different rule was adopted; so that if the nearest relatives of the deceased were nephews and nieces, they did not take equally, although they all stood in the same degree of consanguinity to the testator; but they took only as the representatives of their deceased parents. And no provision was made by the fifth canon of descents for the representative, or even for equality among relatives of the same degree, beyond brother's and sister's children. (1 L. of 1813, p. 53, § 3.) Hence, the issue of nephews and nieces could not take. But the object of the 8th, 9th and 10th sections of the revised statutes under consideration, says the chancellor in *Pond v. Bergh*, (10 Paige, 148,) was to place the law of descents among lineal and collateral relatives upon the same footing in this respect. The class of nearest relatives of the deceased not only take equally when they are his only heirs at law, but all the original members of that class take equally, by themselves, or by their representatives when some of them have died leaving issue; in the same manner as if they had survived the person last seised and had then died intestate. And thus the descendants of nephews and nieces were allowed to take. (See *Report of Revisers*, 3 R. S. 603, 2d ed. *Hannan v. Osborn*, 4 Paige, 336, 340. *Brown v. Burlingham*, 5 Sand. 418. *McGregor v. Comstock*, 3 Comst. 408.)

The descendants take *per capita* when they stand in equal degree of consanguinity to the intestate, and *per stirpes*, when they stand in different degrees of relationship to the common ancestor. These hold, however remote they may be in kindred to the common stock.

V. The fifth rule is, that in default of lineal descendants, parents, brothers and sisters, and their descendants, the inheritance descends 1. To the brothers and sisters of the father of the intestate, in equal shares, if all be living. 2. If any be living, and any shall have died leaving issue, then to such brothers and sisters as shall be living, and to the descendants of such of the said brothers and sisters as shall have died. 3. If all such brothers and sisters shall have died, then to their descendants.

In all these cases the inheritance descends in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate. (1 *R. S.* 752, § 10.) They take *per capita* if in equal degrees, otherwise *per stirpes*.

This rule assumes that the estate was acquired by the intestate by other means than by a descent from either of his parents. This leads to the next rule.

VI. The sixth rule is, that if the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father, and their descendants, have the preference, and in default of them, the estate descends to the brothers and sisters of the mother, and their descendants. (1 *R. S.* 753, § 11.)

But if the inheritance shall have come to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference; and in default of them, the brothers and sisters on the father's side, and their descendants, succeed to the inheritance. (*Id.* § 12.)

Where the inheritance has not come to the intestate on the part either of the father or mother, it descends to the brothers and sisters both of the father and mother of the intestate, in equal shares, and to their descendants, in the same manner as if all the brothers and sisters had been the brothers and sisters of the intestate. (*Id.* § 13.)

The sixth canon of descent at common law was, that the collateral heir of the person *last seised* must be his next collateral kinsman of the whole blood. And the seventh and last canon was, that in collateral inheritances, the male stock must be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, unless when the lands have, in fact, descended from a female. (*Cruise's Dig. tit. 29, chap. 3.*) Both these canons were substantially abrogated by the law of 1786. They are entirely so by the preceding canons, or rules derived from the revised statutes. In addition to which, it is expressly enacted in the 15th section, that relatives of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood; unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. (*Champlin v. Baldwin*, 1 *Paige*, 562.

Brown v. Burlingham, 5 Sandf. 418.) The terms "*the blood*" of the ancestor, in the 15th section of the statute, include his relations of the half blood. (*Beebe v. Griffin*, 4 Kern. 235.)

The case of illegitimates has already been adverted to in a preceding chapter. The question with regard to them arises in two aspects: 1st, with respect to a descent from them; and 2d, in relation to their capacity to take by descent.

The first case is provided for in the revised statutes, (1 R. S. 753, § 14,) by directing the inheritance of an illegitimate, who dies without descendants, to descend to his mother; if she be dead, it then descends to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate. The meaning is that if the mother be dead at the time of the *death of the intestate*. If the mother be living at the time of the death of an illegitimate intestate, the case provided for in the statute does not arise, and the common law rule governs. By the common law, a person of illegitimate birth, not having inheritable blood, can neither inherit lands himself, nor transmit them by descent to any other person except his own legitimate offspring, or persons otherwise capable of inheriting, claiming by inheritance from or through him. (*St. John v. Northup*, 23 Barb. 25.) With respect to his offspring and their descendants, he is a new stock, from which the inheritance is to be derived.

2. Though the revised statutes thus gave an illegitimate a qualified capacity to transmit the inheritance at his death to his living mother, in case of a default of issue, they made no provision in favor of an illegitimate's taking the inheritance by descent from any person. The act of 1855 (*ch.* 547) was made for this contingency. It provides that in default of lawful issue of the mother, illegitimate children may inherit real and personal property from their mother, as if legitimate. It was prospective, and was not to affect any right or title in or to any real or personal property already vested in lawful heirs of any person theretofore deceased. In case the mother should marry and have lawful issue, the illegitimate offspring is left as at common law, without capacity to take by descent from his mother, or any other person.

The revised statutes, in conclusion, enact that in all cases not provided for by the foregoing rules, the inheritance shall descend according to the course of the common law. (1 R. S. 753, § 16.) It will rarely happen that a case will occur which has not been pro-

vided for. None but some remote collateral kindred can ever fall within its provisions. If such a case should occur, it must be determined upon common law principles, in which the right of primogeniture, the preference of males to females, and the exclusion of the half blood, will again control the distribution of the estate. Had the legislature adopted for these remote cases of kindred, the rule of the statute of distributions relative to personal estates, and distributed the property to the next of kin in equal degree to the intestate and their legal representatives, when the case did not fall within any of the preceding rules, there would have been no occasion to resort to the doctrines of the common law for any case.

For such a supposable case, which may by possibility occur, and for such a case only, it may not be out of place to give Lord Coke's explanation in what order the attribute of dignity of blood is applied by legal intendment. This is compendiously arranged, from Coke's Commentary, by Mr. Cruise, (*Co. Lit.* 10 a, 12 a; *Cruise's Dig. tit.* 29, *ch.* 3,) in this manner: 1. To the male stock of the paternal line. 2. The female stock of the paternal line. 3. The male branches of the female stock of the paternal line. 4. The female branches of the female stock of the paternal line. 5. The male stock of the maternal line. 6. The female branches of the male stock of the maternal line. 7. The male branches of the female stock of the maternal line. 8. The female branches of the female stock of the maternal line.*

The rules under our former statute of descents, the act of 1786, did not apply to the descent of estates in remainder or reversion expectant on an estate of freehold; because when there was a preceding estate of freehold, the actual seisin was in the possession of that estate, and not in the person entitled to the remainder or reversion. This rule of the common law, we have already intimated, has been changed in this state by the operation of our law of descents. The right of the ancestor descends on his death to his heirs, whether his right was in possession, remainder or reversion. (*Vanderheyden v. Crandall*, 2 *Denio*, 9.)

Prior to 1782, estates tail existed in this state and were occasionally created. By that act and the act by which it was revived and repealed in 1786, estates in fee tail, whether existing in 1782 or there-

* Professor Greenleaf has inserted, in his valuable edition of Cruise's Digest, vol. 2, from page 166 to 179, an interesting summary of the rules of descent in the various states of the Union.

after created, were converted into estates in fee simple absolute. (1 *R. L.* 52.) This law we have already seen was incorporated in the revision of 1830, and is still the law of this state; so that there cannot be at present any such estate in this state. In the investigation of old titles it has sometimes been found necessary to inquire whether a specified estate was an estate in fee simple or fee tail. This was the case in *Vanderheyden v. Crandall*, (*supra.*) It is therefore deemed expedient here merely to define an estate in fee tail, as it formerly existed, and give the rule of descent with reference to it.

An estate in fee tail grew out of the statute *De donis conditionalibus*, (13 *Edw.* 1, *ch.* 1,) by which estates of inheritance were made descendible to some particular heirs only of the person to whom they were granted, and not to his heirs generally. The donee of an estate tail was the first purchaser of it, and none save those who were lineally descended from him, and answered the limitation, general or special, could inherit it *per formam doni*. But primogeniture amongst the males, and coparcenary amongst the females, who were not excluded by the original gift, existed, and a posthumous child was not prejudiced by reason of his coming after prior children.

In tracing descent, then, to an estate tail, the maxim *seisina facit stipitem* never applied, for the issue are as much within the donor's intention, and as personally and precisely described in the gift as any of their ancestors; and consequently the half blood is not excluded, since the issue in tail is ever of the whole blood to the donee; neither does the rule of *possessio fratris* obtain. (*Wharton's Conv.* 534.)

The statute of descents does not affect the estate of a husband as tenant by the curtesy, or of a widow as tenant in dower. Nor does it prevent real estate held in trust for any other person, when not derived by the person for whose use it is held, from descending to his heirs, according to the provisions of the act which we have been considering. (1 *R. S.* 754, §§ 20, 21.)

In determining the value of the real estate descended to an heir, the conveyancer will sometimes have to inquire whether there be any incumbrance upon it, either created by the original owner, or by the heir after the death of the ancestor; or whether by reason of any advancement by the ancestor in his lifetime the value of the portion belonging to the heir is affected.

The doctrine of advancement was carried into the law of descent by the legislature, in 1830, from the statute of distributions, which latter was drawn from the English statute on the same subject, and had reference only to the personal assets. Under our law of distributing real estate, there is the same equity that the child who has been advanced by the parent in his lifetime, with a view to a portion or settlement in life, should bring it into hotchpot with his brothers and sisters not thus favored, as in the case of the distribution of the personal estate. The statute has therefore wisely enacted, that if any child of an intestate shall have been advanced by him by settlement or portion of real or personal estate or of both of them, the value thereof shall be reckoned for the purpose of this section only, as part of the real and personal estate of such intestate, descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate. (1 *R. S.* 754, § 23.) But if such advancement be not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children in such real and personal estate and advancements to be equal as near as can be estimated. (*Id.* § 24.)

To obviate any controversy as to the value of any real or personal estate so advanced, it is provided that it shall be deemed that, if any, which was acknowledged by the child by an instrument in writing; otherwise its value shall be estimated according to the worth of the property when given. (*Id.* § 25.)

It is not every sum of money, or other valuable thing which an indulgent parent may furnish one child in preference to another, that will constitute an advancement, within the meaning of the law. Nor will the maintaining or education of a child, without a view to a portion or settlement in life, constitute an advancement. (*Id.* § 26.) The parent is bound to support and educate his offspring according to his state and circumstances in life. (*Vail v. Vail*, 10 *Barb.* 69. *McRae v. McRae*, 3 *Bradf.* 199.) And though the education or support of one be more expensive than

that of the others, this difference does not *per se* constitute an advancement.

The revised statutes make the heirs of every person who shall have died intestate, and the heirs and devisees of any person who shall have died after the making of his last will and testament, respectively liable for the debts of such person, arising by simple contract or by specialty, to the extent of the estate, interest and right in the real estate which shall have descended to them from, or been devised to them by such person. (2 R. S. 452, § 22.) But the heirs are not liable for any such debt, unless it shall appear that the deceased left no personal assets within this state to be administered, or that the personal assets of the deceased were not sufficient to pay and discharge the same; or that after due proceedings before the proper surrogate's court and at law, the creditor has been unable to collect such debt, or some part thereof, from the personal representatives of the deceased, or from his next of kin or legatees. (*Id.* § 33.)

If the debts of the intestate have been reduced to judgment against him in his lifetime, and the judgment has been docketed in proper manner, a lien is created upon the real estate, which independent of the above statute will follow it into whosoever hands it may pass. The first inquiry, therefore, of the conveyancer who is called upon to investigate the validity of the title of the heir, is to ascertain the nature and extent of the title of the ancestor, and to search for incumbrances, by judgment or mortgage, against him.

But the liability of the heir or devisee for the debts of the deceased is not confined to such as are either a specific or general lien upon his lands. He is liable also for the simple contract or specialty debts of the deceased, to the extent of the interest he takes in the estate by descent or devise. These debts are an equitable lien upon the estate in the possession of the heir or devisee, and prior in time to judgments recovered against them for their individual debts. (*Morris v. Mowatt*, 2 Paige, 586.) But as the personal estate is the primary fund for the payment of the debts of a deceased person, his heirs are not liable for those debts unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings before the surrogate and at law, the creditor has been unable to collect such debt from the executor or administrator, or from the next of kin or legatees. Thus, a suit at law against

the prior parties is an essential preliminary to a right to sue the heirs; and the latter are to be sued jointly in equity. (*Stuart v. Kissam*, 11 Barb. 271.)

By the provisions of the title of the revised statutes relative to the powers and duties of executors and administrators in relation to the sale and disposition of the real estate of their testator or intestate, the personal representatives are authorized to apply to the surrogate for a sale of the real estate of the deceased for the payment of his debts, at any time within three years after the granting of letters testamentary or of administration. And if such personal representatives neglect to apply to the surrogate, any creditor is authorized to make a similar application to the surrogate to compel such sale after citing the executors or administrators to account. (2 R. S. 100, § 1. 1 *id.* 108, § 48, amended in 1837, 1843 and 1847; 3 *id.* 196, 5th ed.) The legislature having furnished this cheap and summary mode of providing for the payment of the creditors out of the real estate of the deceased, when his personal estate is insufficient for that purpose, absolutely prohibited the creditor, by the 53d section of the same title, from wasting the real estate by useless suits in a court of equity against the heirs or devisees, during the time limited for the institution of proceedings before the surrogate for such sale. The first clause of that section in terms declares, that no suit shall be brought against the heirs or devisees of any real estate in order to charge them with the debts of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon the estate of their testator or intestate. (*Butts v. Genung*, 5 Paige, 257. *Schermerhorn v. Barhydt*, 9 *id.* 45, 46.) Although since the decision of the chancellor in the foregoing cases, the 48th section has been repealed and another substituted in its place, extending the time within which a creditor may apply to the surrogate for an order compelling the executors or administrators to mortgage, lease or sell the real estate of the testator or intestate for the payment of his debts, the principle then decided is not changed. (*Skidmore v. Romaine*, 2 Bradf. 122.)

Though the heir takes an absolute title to the land descended, subject only to be defeated or charged with the debts of the testator or intestate, either by the representatives or the creditors taking the steps authorized by the statute, it will, in practice, sometimes be difficult to ascertain when the land is entirely free from a liability to be thus proceeded against. (*Wilson v. Wilson*, 13 Barb. 252.)

The executors or administrators are expressly limited to three years from the date of their letters, within which to make the application to the surrogate. If they omit to proceed within the time allowed for that purpose, any creditor of the deceased may apply to the surrogate for an order for the executors or administrators to show cause before the surrogate why they should not be required to mortgage, lease or sell the real estate of the deceased for the payment of debts. This application may be made at any time after the granting of letters testamentary or of administration; and the executor or administrator is forbidden to show, for cause, that the time *within which he is allowed to sell the same has expired*. There is a good reason why the executors or administrators should not be permitted to allege their own laches in this respect, as a bar to a claim of a creditor. But the law has not taken from the heirs or devisees, or other creditors, the right of interposing the statute of limitations, or any other defense, to the claim of the creditor who makes the application.

1. The heirs and devisees have a direct interest in the question; and to remove all doubt as to their right to contest the validity of the claims presented, the statute has expressly granted it in terms, and forbid the admission of any such claim by an executor or administrator, as evidence to revive the same, or in any way affect it. (2 R. S. 100, § 10, as amended by § 72 of the act of 1837, ch. 46, and L. of 1843, ch. 172. *Skidmore v. Romaine*, 2 Bradf. 122. *Ferguson v. Broom*, 1 id. 10. *Renwick v. Renwick*, 1 id. 234. *Wilcox v. Smith*, 26 Barb. 316. *Martin v. Gage*, 5 Seld. 398.)

2. Any other creditor of the deceased, and probably a purchaser from an heir or devisee of the deceased, have the same right to contest the validity of any claim. They have an interest in the fund which the court will protect. (*Mooers v. White*, 6 John. Ch. 360.) The proceeding before the surrogate to establish claims against the estate is analogous to that under the common decree in an administration suit. In the latter case it was held by the master of the rolls in *Shewen v. Vanderhorst*, (1 Russ. & Myl. 347,) that it was competent for any of the parties interested in the fund to set up the statute of limitations in bar of the claim of a creditor seeking to establish his debt before the master, although the executors refused to interfere. The decision was affirmed, on appeal, by Lord Brougham, who remarked that, without saying how far the master himself might be entitled to set up the objection, he could see no

reason why it might not be taken by a creditor, or a volunteer, as well as by the personal representative. (*Id. Mooers v. White, supra. Wilcox v. Smith, supra. Willard on Executors, 317.*)

With respect to an application by a creditor to the surrogate for an order on the executors or administrators to show cause why he should not be required to mortgage, lease or sell so much of the real estate as may be necessary to pay the debts of the deceased, there is no limitation of time within which it may be made. In this respect it is the same as the former statute in relation to the application of executors and administrators. And yet, under that statute, Chancellor Kent held that the application should be made within a year from the granting of letters testamentary or of administration. (*Mooers v. White, supra.*) And the supreme court, without prescribing any definite period, expressed an opinion that the lapse of fourteen years between the granting of administration and an application to a surrogate for the sale of real estate, was a sufficient cause, without explanation, for the rejection of the application. (*Jackson v. Robinson, 4 Wend. 436.*) In the last mentioned case, the question arose in an action of ejectment brought by a party claiming title under a deed executed by an administratrix under and in pursuance of a sale by virtue of the order of the surrogate made while the law of 1813 was in force. It did not appear that the objection had been taken before the surrogate, that an unreasonable period had elapsed between the granting of the letters and the application for the order of sale. The defendant claimed under a deed from the heirs at law, and raised this question for the first time on the trial of the ejectment, and called upon the court to hold that the sale under the surrogate's order was void. But the court, while holding that the surrogate should, in the absence of satisfactory explanation, have denied the order of sale, had the objection been taken, thought it could not be pronounced void in this collateral action. The proper remedy doubtless was to raise the objection before the surrogate, and on its being overruled, appeal.

It was perhaps impossible to prescribe a limit within which a creditor might be required to make the application. In most cases it may be presumed that estates will be fully settled up during the period which the law has given to the executors and administrators for that purpose. The right given to the creditors to become actors probably applies only to the exceptional cases of neglect of the

personal representatives to make the application within the time prescribed for them. Public policy, says Chancellor Kent, in *Moore v. White*, (*supra*), requires that a power of such formidable import, and which affects the bona fide purchaser equally with the devisee, should be strictly construed. Nor will the creditor for whose benefit the whole provision is intended, be materially affected. In analogy to the cases of *Moore v. White*, and *Jackson v. Robinson*, (*supra*), it would seem that the surrogate should limit the creditor to a period not exceeding a year from the expiration of the three years from the date of the letters testamentary or of administration, unless under peculiar circumstances, a longer time might be adjudged necessary consistently with sound policy and justice. The defense should be interposed before the surrogate at the time for showing cause.

The real estate may also be charged by the testator with the payment of debts and legacies. Such charge will be an incumbrance on it in whose hands soever it may be. It will be necessary for the conveyancer who investigates the validity of the title, to examine the last will and testament of the former owner to see whether the real estate is well charged with debts or legacies, and to ascertain whether those debts and legacies have been paid off and extinguished.

To inquire what language in a will operates to create a charge upon the real estate of the testator, a more appropriate occasion will arise, when we come, in a subsequent chapter, to consider the doctrine of wills and devises. We shall therefore postpone a more full discussion of this branch of our subject, till then. (*See post*, *ch.* 9, § 4.)

CHAPTER IV.

OF TITLE BY PURCHASE.

We stated in a former chapter, that the mode of acquiring title to real property might be reduced to two, by descent and purchase. In the former the title is vested in a person by the operation of law, and in the latter by the act and agreement of the party. If by the term purchase we are to understand with Littleton, that it embraces every other method of coming to an estate, but merely that

of inheritance, the reducing the number of modes by which a title can be acquired to two, descent and purchase, is sufficiently accurate for all purposes.

We have treated in the last chapter of title by descent. We shall treat in the present of title by purchase. It embraces, among others, the following methods of acquiring and defending the title to estates: 1. Escheat; 2. Forfeiture; 3. Prescription; 4. Adverse enjoyment; 5. Occupancy; 6. Election; 7. Estoppel; and 8. Alienation. We shall treat of them in their order.

SECTION I.

Of Escheat and Forfeiture.

1. An escheat is one of the incidents of the feudal tenures. It denotes, according to the systematic writers on this subject, an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee. (2 *Bl. Com.* 244.)

An escheat at common law is partly of the nature of a purchase, and partly of descent. It was a purchase so far as it was necessary for the lord to enter on the reverted property in order to complete his full ownership of it; and it was a descent because the escheated property followed the seignory, and was inherited along with it, by the lord's heir at law. It occurred in England on the death, intestate, of the tenant without heir capable of inheriting, and on his attainder for certain crimes.

The laws of this state declare that the people in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of this state; and it is enacted, that all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people. (1 *R. S.* 718, § 1.)

There are two cases with us in which lands escheat. First, when the tenant in fee dies seised, leaving no heir capable of inheriting the property, and making no valid disposition of it by will; and second, when lands are purchased by an alien who cannot hold as against the state. In both these cases, says Bronson, J. the property immediately reverts to, and vests in the people, as the original and ultimate proprietors of all the lands within the state. If there be an outstanding life estate, the people will not be entitled to the

possession until that estate has terminated; but this cannot affect their title to the fee. (*The People v. Conklin*, 2 Hill, 74.)

It would seem from the foregoing remarks of the learned judge, that to entitle the state to the real estate of the intestate by escheat, he must *have died seised*. But this is not required by the statute. In the case before the court, the testator having no relatives but aliens, devised to his wife for life, remainder in fee to aliens. It was held that the estate in remainder escheated on the testator's death, though the people could not enter until the life estate terminated.

Some of the cases decided in this state arose prior to the revised statutes, when the descent of real property was deduced from the person *last seised*. This was the case of *Jackson v. Jackson*, (7 John. 214,) in which it was held that if the next heir of the person last seised be an alien, the land does not therefore escheat, but goes to a remoter heir, if there be any who is capable of taking.

By the common law, according to Mr. Cruise, if lands held in trust escheated to the king, he held them free from the trust. Such would have been the rule in this state, with reference to the people, who take the place of the king, but for our legislation on the subject. The revised statutes provide that all escheated lands, when held by the state or its grantees, shall be subject to the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended; and the supreme court, formerly the court of chancery, is empowered to direct the attorney general to convey such lands to the parties equitably entitled thereto according to their respective rights, or to such new trustee, as may be appointed by such court. (1 R. S. 718, § 2.)

Although all the lands within this state are declared to be allodial, so that the entire and absolute property is vested in the owners according to the nature of their respective estates; and all feudal tenures of every description, with all their incidents are abolished, an exception is made in favor of escheat, which instead of going to the lord as at common law, vests, we have seen, the estate in the people, with its burdens as well as benefits. (*Id.* § 3.)

The former practice in this state to obtain the possession of escheated lands was, under the statute of 24th March, 1801, (1 K. & R. 310,) by a writ of escheat, issued out of chancery on the application of the attorney general; and the inquisition found thereupon might be traversed; and on a traverse of it, the traverser was con-

sidered as a defendant, and if he showed that the people had no title, though he proved nothing but a bare possession in himself, he was entitled to judgment. (*The People v. Cutting*, 3 *John.* 1.) The revised statutes have changed this practice, and substituted an action of ejectment, which is superseded in modern practice, under the code by a civil action. (1 *R. S.* 282; 1 *id.* 685, 5th ed.) The statute now contains suitable provisions for the recovery of escheated lands, and for fulfilling any contracts which may have been made by the person last seised, or by any person from whom his title is derived, so far as to convey the right and title of this state, pursuant to such contract, without any covenants of warranty or otherwise, and to allow all payments which may have been made on such contracts. It is not deemed expedient to give an abstract of the statute, or pursue the subject further.

2. We have a statute which treats of the recovery of forfeited estate. (1 *R. S.* 284.) It assumes that such forfeiture may occur upon a conviction or outlawry for treason, and gives to the attorney general the same remedy to recover real estate so forfeited, as in the case of escheated land. That remedy, we have seen, is ejectment, or its substitute under the code. There has been no conviction and forfeiture for treason in this state since the revolution.

In an action brought by the people to recover lands escheated to the people or otherwise forfeited, the latter must prove that at the time of the commencement of the action they had a valid subsisting interest in the premises claimed, or right to recover the possession thereof. With respect to making out the proof of title in themselves, the people have an advantage over an individual. By right of sovereignty, they are deemed the owners of all the lands within the state, except such as have been granted to others, or have been lost by lapse of time. Hence it is enough for the people to prove in the first instance, that the premises in dispute were vacant and unoccupied, within a period necessary to constitute an adverse possession against them, and that the defendants subsequently entered or made claim to them. (*Wendell v. The People*, 8 *Wend.* 183. *The People v. Dennison*, 17 *id.* 313. *The People v. Van Rensselaer*, 5 *Selden*, 319.)

SECTION II.

Of title by Prescription, by Adverse Enjoyment, and Occupancy.

1. The doctrine of prescription seems to have been introduced into English jurisprudence from the Roman law. It is founded on this presumption, that he who has had a quiet and uninterrupted possession of any thing, for a long period of years, is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it. For a long possession may be considered a better title than can commonly be produced, as it supposes an acquiescence of all other claimants; and that acquiescence also supposes some reason for which the claim was forborne.

By the common law a prescription can only be made to *incorporeal hereditaments*, such as rents, right of way and the like. It will not in any case give a right to erect a building on another's land. This is a mark of title and exclusive enjoyment, which cannot be acquired by prescription. Title to land requires the higher evidence of corporeal seisin and inheritance. (*Ferris v. Brown*, 3 Barb. S. C. R. 109. *Cortelyou v. Van Brundt*, 2 John. 362.)

Nor will lapse of time enable a party to prescribe for a nuisance, though a temporary occupation of part of a street or highway by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like; is allowed from the necessity of the case; yet a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable. (*The People v. Cunningham*, 1 Den. 524. *Mills v. Hall*, 9 Wend. 315.)

There is another kind of prescription established by statute law, extending to corporeal hereditaments, by which an uninterrupted possession for a certain number of years will give the possessor a good title, by taking from all others the right of maintaining any action for the recovery thereof.

There are, therefore, two kinds of prescriptions known to our law. The first, a prescription to *incorporeal hereditaments* by a usage of at least twenty years, which period our courts, in analogy to the statute of limitations, have adopted instead of the immemorial usage of the English law. This is a positive prescription, and the kind which we are now considering.

A prescription differs from custom in this, that a custom is prop-

erly a *local* usage not annexed to the person; such as a right or privilege which several persons have to the produce of the lands or water of another. Thus common of pasture is a right of feeding the beasts of one person on the lands of another; common of estovers is the right the tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, &c.; common of turbary and piscary are in like manner rights which tenants have to cut turf or take fish in the grounds or waters of the lord. (*Per Savage, Ch. J. in Van Rensselaer v. Radcliff*, 10 Wend. 647.) Prescription, on the other hand, is always annexed to a particular person. (*Co. Litt.* 113 b.)

This kind of prescription is of *two sorts*; a *personal right*, or else a right attached to the ownership of a particular estate, and only exercised by those who are seised of that estate. (*Id.*) The *first* is termed a prescription in the person; the *second*, a prescription in a *que estate*. (*Cruise's Dig. title Prescription.*)

This last, a prescription in a *que estate*, must always be laid in the person who is seised of the *fee simple*. A tenant for life, or years, or at will, cannot prescribe in this manner, by reason of the imbecility of their estates. The reason given for this is that as prescription is always beyond time of memory, it would be absurd that those whose estates commenced within the memory of man should intend to prescribe for any thing. Therefore tenant for life must prescribe, under cover of the tenant in fee simple. (6 *Co.* 60 a.)

The reason for this distinction does not exist in this state, since an uninterrupted and adverse and exclusive enjoyment of twenty years affords a conclusive presumption of a grant, or a right, as the case may be. A prescription cannot be predicated upon a user of less than twenty years; and as it supposes a grant it is not applicable to a case where there can be no grantee. (*Per Gridley, J. in Munson v. Hungerford*, 6 Barb. 265.)

It is laid down in the English books that a prescription by immemorial usage can in general only be of things which may be created by *grant*; for the law allows prescription only to supply the loss of a grant. (*Cruise's Dig. tit. 31, ch. 1, § 1.*) Hence an easement which is a seisin, or convenience that one neighbor hath of another, without profit, as a way through his land, a sink, or such like, may be claimed by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom. (*Id.*)

There is a difference between a prescription and a dedication, though some of the principles on which they are founded are common to both. The one is personal, and the other belongs not to one, but the public generally. (*See Post v. Pearsall*, 22 *Wend.* 425; *S. C.* 20 *id.* 111, where most of the cases are examined.)

While a prescription by immemorial usage can only be of things which may be *created by grant*, a prescription in a *que estate* is not predicable of things that lie in grant, and can be affirmed only of things that cannot pass without deed, or by descent from ancestors without a conveyance. (*Co Litt.* 121 *a.*)

The first essential requisite to form a prescription is the *length of time* during which it has existed. In England this is said to be from time *whereof the memory of man runneth not to the contrary*, which has long been ascertained to commence from the beginning of the reign of Richard I. The reason given for fixing that period is said by Littleton, that that was the limitation of writs of right, the highest writ in its nature. (*Litt.* § 170.) That reason does not exist in this country, which was not settled until centuries after that period; but the principle on which the doctrine originally rested, the period of limitation for a writ of right, has led the courts in this country to adopt the period of our statute of limitations against the recovery of real property from an adverse holder, as that which will authorize the presumption of a grant. In this state it is well settled that a prescription cannot be *predicated* upon a user of less than twenty years. (*Munson v. Hungerford*, *supra.*) The presumption of a grant from twenty years' uninterrupted use, has been frequently held conclusive of a right. In *Stiles v. Hooker*, 7 *Cowen*, 266,) it was applied in favor of the owner of a mill, who had, for twenty years or more, used the water of a stream at a particular height. In *Corning v. Gould*, (16 *Wend.* 531,) it was held that a grant of a right of way might be presumed from a continuous and adverse user of twenty years. (*See Hoyt v. Carter*, 16 *Barb.* 213.)

With regard to ancient lights, it was said by the court in *Parker v. Foote*, (19 *Wend.* 309,) that the modern English doctrine on that subject was anomalous, and that in this state there was no absolute legal presumption of the grant of such an easement from the time of their enjoyment; but it must be left to the jury to draw the presumption or not, as the circumstances may in their judgment warrant.

The statute of limitations for the recovery of real property differs in the different states. But the principle on which a prescription is founded in this country is generally conceded to have reference to that period. Hence in some a longer and in others a shorter period than twenty years is adopted. (*Coolidge v. Learned*, 8 *Pick.* 503. *Melvin v. Whiting*, 10 *id.* 295. *Mitchell v. Walker*, 1 *Ark.* 266. *Ingraham v. Hutchinson*, 2 *Conn. Rep.* 584.)

The second essential requisite to a valid prescription is that it must have a *continued and peaceable usage and enjoyment*. In *Colvin v. Burnett*, (17 *Wend.* 568,) the question arose upon pleadings; and the learned judge who delivered the opinion of the court, adopting the language of Putnam, J. in *Sargeant v. Ballard*, (9 *Pick.* 251, 255,) says the essential ingredients of a prescription are that the user for twenty years was continuous, uninterrupted and adverse; that is, under a claim of right, with the acquiescence and knowledge of the owner. And in another and later case they say that the right to flow the lands of another, founded upon an exclusive and uninterrupted enjoyment for twenty years, cannot be acquired unless the enjoyment be adverse. They, however, admit that the uninterrupted possession is *prima facie* evidence that it is adverse, but such conclusion may be rebutted by proof that it was commenced and continued without any claim of right. (*Hart v. Vose*, 19 *Wend.* 365. *Gayetta B. Bethune*, 14 *Mass. Rep.* 49.)

The third ingredient is that the prescription must be *certain and reasonable*. It must be open, peaceable, continued, and unequivocal, and be adverse, that is, of a nature to indicate that it is claimed as a right, and not the effect of mere indulgence. (*Id.*)

As a prescription must have a peaceable and uninterrupted enjoyment, it may be lost by *neglecting to claim or exercise* it. Abandonment is a simple non-user, and to operate as an extinguishment, it must have been continuous for twenty years. (*Corning v. Gould*, 16 *Wend.* 531.) It must have totally ceased for the same length of time that was necessary to create the original presumption.

A temporary relinquishment of the right, if accompanied with an intention to resume it within a reasonable time; and when there are no circumstances intimating the suspension to be temporary only, a *bona fide* purchaser will be protected in the enjoyment of the property as it appeared at the time of the purchase. (*Id.*)

2. Title by adverse enjoyment is the second kind of prescription, and owes its origin to the statute of limitations. It differs from a prescription in this, that by a prescription of twenty years uninterrupted adverse enjoyment, a right to an incorporeal hereditament is acquired, or a grant thereof conclusively presumed; whereas in this second sort of prescription no positive right is acquired, but only the remedy of the former possessor is taken away, for the recovery of a corporeal or incorporeal hereditament. For this reason it has sometimes been called a *negative prescription*. It is more generally applicable to *corporeal* than to *incorporeal* hereditaments.

Though the statute of limitations does not profess to take an estate from one man and give it to another, it extinguishes the claim of the former owner, and quiets the possession of the actual occupant who proves that he has occupied the premises under a color of title peaceably and quietly for the period prescribed by the law. It is therefore truly spoken of as a source of title; and is in truth as valid and effectual as a grant from the sovereign power of the state.

The statute of limitations in this state, with reference to real property, was revised in 1801, and again in 1830, and subsequently at the adoption of the code of procedure. (1 *R. L.* 181. 2 *R. S.* 292. *Code of Procedure*, § 75 *et seq.*) The act of 1801 provided that the people of this state would not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless such right or title should have accrued within forty years before any action or other proceeding for the same should be commenced, or unless the people, or those from whom they claim, should have received the rents and profits of such real estate, or of some part thereof, within the space of forty years. At the revision in 1830, this limitation was reduced to twenty years, and so continued till 1848, when at the adoption of the code of procedure it was restored to forty years, where it has ever since remained. As against the people, the defendant must show title in himself, or a continued possession of forty years. (*The People v. Van Rensselaer*, 8 *Barb.* 189.)

The limitation for a writ of right, by the law of 1801, was twenty-five years. This was reduced to twenty years by the revised statutes of 1830, and has been so continued in the code. The writ of right was indeed abolished, but the limitation of twenty years was applied to the substituted remedy.

The existing law is that which is provided by the code; which has also adopted, from the decisions of the courts, the principles which govern in cases of adverse possession. (*Code*, § 78, &c.)

It provides that no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff or his ancestor, predecessor or grantor, was seised or possessed of the premises in question within twenty years before the commencement of such action. This provision covers what was formerly a writ of right, as well as the various possessory actions, which in this state were formerly embraced in the action of ejectment. They are now all placed upon the same footing.

The same principle is extended as well to the action or its defense, when founded upon the title to real property, or to rents or services out of the same; and neither is effectual unless it appears in the one case that the persons prosecuting the action, and in the other the party making the defense, or under whose title the action is prosecuted or defended, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question, within twenty years before the commencement of the act in respect to which such action is prosecuted or defense made. (*Code*, § 79.)

The statute has wisely given a legislative definition of the effect of an entry, by declaring that it shall not be deemed sufficient, or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

The person establishing a legal title to the premises is, in every action for the recovery thereof, presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action. (*Id.* § 81.)

The foregoing provision of the code was borrowed from the revised statutes of 1830, and was supposed to express the result of the multifarious decisions of the courts, as to the presumption that every possession was under the legal title. (*Jackson v. Sharp*, 9 *John*. 163. *Wickham v. Conklin*, 8 *id.* 228. *Jackson v. Thomas*, 16 *id.* 293.)

The doctrine with respect to adverse possession had become pretty well settled as early as 1830, when the revised statutes took effect. Some of the rules on the subject were supposed to be subtle and refined; but having been long the subject of judicial exposition, it was supposed by the legislature that they could be stated with precision and clearness; and it was therefore proposed, in the recommendation of the revisers, that they should be fixed by legislative enactment. The object was, 1. To make the statute of limitations better understood; 2. To give to the rules a permanent character, and rescue them from the fluctuations of opinions; and 3. That the community at large might have the means of knowing the most important laws respecting the enjoyment of their property. (*See Revisers' notes on the subject, 3 R. S. 699, 2d ed.*)

The statute was made so as to embrace two of the most important classes of cases, viz: 1st. Where the entry into the possession of the premises was under a claim of title, exclusive of any other right, founded upon a written instrument, as, being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and 2d. Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree.

The legislature intended to fix the rules with respect to these two classes of cases by permanent enactment, and therefore adopted substantially the expositions given to the subject by the courts. And the same sections were retained by the code of procedure, unaltered, and are still the law of this state. They obviously supersede the necessity of introducing, in this place, the adjudged cases upon which they are founded.

With respect to the first class of cases, to wit, where the entry was under a written instrument, as being a conveyance of the premises in question, or upon the judgment or decree of a competent court, the enactment is, that where there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract. (2 R. S. 294, § 9. *Code of Procedure*, § 82.)

This provision was intended to exclude the doctrine of a *constructive* adverse possession as applicable to large tracts of land. That doctrine is admissible only when it is applied to a lot or farm; in which latter case the improvement of a part of a lot or farm will give a valid constructive possession of the residue, although not improved. But it is essential to support such constructive possession, that the deed or writing should include within its boundaries, the land not occupied and improved. (*Jackson v. Camp*, 1 *Cowen*, 605. *Jackson v. Woodruff*, *Id.* 286. *Same v. Richards*, 6 *id.* 617. *Sharp v. Brandow*, 15 *Wend.* 597.)

The foregoing section does not define what shall be deemed to have been such a possession or occupation of land, as to constitute an adverse possession, by a person claiming a title founded upon a written instrument, or a judgment or decree. To supply that deficiency the statute declared what was necessary to constitute such occupancy or possession; and it was declared to be 1, where the land so claimed has been usually cultivated or improved; 2, where it has been protected by a substantial inclosure; 3, where, although not inclosed, it has been used for the supply of fuel or fencing timber, for the purposes of husbandry, or the ordinary use of the occupant; 4, where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. (2 *R. S.* 294, § 10. *Code*, § 83.)

The laws should be made with reference to the actual condition of the society upon which they are to operate. This is not the same in every part of the state. In some counties lands have not been reclaimed from their primeval forests. In others, farms will be found in every stage of improvement; some just emerging from a wild state, and others already reduced to cultivation. The statute is broad enough for every case; and yet there will often be occasions for the exercise of a wise discretion in courts and juries in the application of the rules.

With respect to the *second* class of cases, namely, an occupation or possession of lands under a claim of title *not written*, or by *judgment* or *decree*, a like policy was pursued by the legislature of conforming the written law to the approved judicial decisions. The supreme court, as early as 1812, had decided in *Smith v. Burtis*,

(9 *John*. 180) that a possession for ever so long a time, stripped of the circumstances that it was accompanied with the claim of the entire title, would not amount to an adverse possession, barring those who had the real and legitimate title. It was not required that there should be a *rightful* title. The fact of the possession, and the *quo animo*, it was commenced or continued, were the only tests.

To carry out these views, the statute expressly enacted that where it shall appear that there has been an actual continuous occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely. (2 *R. S.* 294, § 11. *Code*, § 84.)

The actual *occupancy* is thus made the criterion, when the right is not founded upon a written instrument, or judgment, or decree. What shall constitute such occupancy as to amount to an adverse possession, is there declared to be 1, where the land has been protected by a substantial inclosure; and 2, where it has been usually cultivated or improved. (2 *R. S.* 294, § 12. *Code*, § 85.) This is only the adoption of the principle which had long been held by the courts, that a mere possession fence, as it is called, made by felling trees and lapping them upon one another, is too loose and equivocal, to take away the right of entry from the rightful owner. There must, say the court, be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, when that is the only defense interposed to countervail a legal right. (*Jackson v. Schoonmaker*, 2 *John*. 230.) But the inclosure may be in part natural, as a continued ledge of rocks, a mountain or a navigable river. (*Jackson v. Halstead*, 5 *Cowen*, 216.) If there is no written title, judgment or decree, but the defendant relies solely on possession, with an assertion of title, he can retain so much only as he had under actual improvement, and within a substantial inclosure. (*Jackson v. Warford*, 7 *Wendell*, 62.)

The effect of the statute of limitations when applied to civil actions, is to mature a wrong into a right, by cutting off the remedy. (*Per Cowen, J. in Humbert v. Trinity Church*, 24 *Wend.* 604.) To warrant its application in ejectment, the books require *color of title*, by deed or other documental semblance of right in the defend-

ant, only when the defense is founded on a *constructive adverse possession*. But neither a deed nor any equivalent muniment is necessary where the possession is indicated by *actual occupation, and any other evidence of an adverse claim exists*. An oral claim of exclusive title, or any other circumstances by which the absolute owner of land is distinguished from the naked possessor, are equally admissible, and may be equally satisfactory. (*Id.*)

If on the trial the defendant shows that he took possession claiming under a deed, he is not bound to produce the deed, though called for by the plaintiff, but may rely on his adverse possession. (*Jackson v. Wheat*, 18 John. 40. *Same v. Newton*, *Id.* 355. *Bradstreet v. Clarke*, 12 Wend. 674.) It is not necessary that there should be a rightful title. All that is necessary is that it should be a possession taken and held in good faith, under claim and color of title, and exclusive of any other right. The defense of adverse possession assumes that the defendant has not a valid legal paper title; if he had, he need not rely upon the length of his possession. The fact of the possession and the *quo animo* it was commenced and continued, are the only tests. He need not even produce the deed under which he claims; and if, when produced, it is *defective* as a deed, as for want of a seal or otherwise, it will not destroy the effect of the defendant's possession. (*Bradstreet v. Clarke*, *supra*.)

The title claimed must be such an one as the law will *prima facie* consider a good title. (*Jackson v. Frost*, 1 Cowen, 346.) If it is subservient to and admits the existence of another and a higher title, the possession is not adverse to that title, the possessor must claim the entire title. (*Jackson v. Johnson*, 5 Cowen, 74.) On the foregoing principles, a quit-claim deed given by a mere squatter, without color of title, in consideration of a discontinuance of an ejectment against him, does not change the character of the possession. (*Jackson v. Hill*, 5 Wend. 532.)

But adverse possession cannot be founded on an absolutely *void* conveyance; as for example, a deed given pending a suit concerning the land, which is void for champerty. (*Jackson v. Andrews*, 7 Wend. 152.) Nor upon a deed founded in fraud; nor upon a deed executed by another without authority, to the knowledge of the grantee. (*Livingston v. The Peru Iron Co.* 9 Wend. 511.)

From the nature of the estate of tenants in common and joint tenants, each has a right to the possession; and therefore the possession of one will not be treated as adverse to his companions, un-

less there has been an ouster. If one tenant in common actually excludes his co-tenants it is an ouster, and his possession then becomes adverse. (*Humbert v. Trinity Church*, 24 *Wend.* 587. So the grantee of one tenant in common of the whole premises, who enters under the grant and claims title to the whole, holds adversely to the other tenants in common. (*Clapp v. Bramagham*, 9 *Cowen*, 530. *Town v. Needham*, 3 *Paige*, 545.) So if one tenant in common claims possession of the whole, under a warranty deed from a stranger, it is a sufficient ouster. (*Siglar v. Van Riper*, 10 *Wend.* 414.)

A party holding adversely may, by a recognition of the rightful title, lose the benefit of his adverse holding. If while in possession he offers to purchase the title of the claimant, it is a circumstance which, unexplained, will authorize the presumption that he came into possession under such title. (*Jackson v. Croy*, 12 *John.* 427. *Jackson v. Britton*, 4 *Wend.* 507.)

But this rule does not prevent a person in possession from quieting his title, by taking a quit-claim or any other deed from a stranger, who interposes any claim to the land. (*Northrop v. Wright*, 7 *Hill*, 476.)

The relation of landlord and tenant gave occasion for some conflict of opinion with respect to the right of the latter to set up an adverse possession against the former. It was held at an early day that a person who entered into possession under another, and acknowledged his title, could not set up an outstanding title in a third person. (*Jackson v. Stewart*, 6 *John.* 34. *Same v. De Walts*, 7 *id.* 157.) Nor, after recognizing the lessor as his landlord, could he afterwards dispute his title. (*Jackson v. Vosburgh*, 7 *id.* 186. *Same v. Reynolds*, 1 *Caines*, 444. *Same v. Whitford*, 2 *id.* 215.) Indeed, the doctrine was carried out to that extent, that when the relation of landlord and tenant was once established, it attached to all who might succeed to the possession, through or under the tenant, either immediately or remotely; and this, though the purchaser from the lessee took an absolute grant, not knowing of the tenancy. (*Jackson v. Harsen*, 7 *Cowen*, 323. *Same v. Scissam*, 3 *John.* 499. *Jackson v. Davis*, 5 *Cowen*, 123.) It was justly thought by the legislature that there should be some limitation on the forbearance of the landlord, and that some reasonable period should be fixed beyond which, if he forbore to assert his right, the possession of the occupant might be deemed adverse. This was accordingly

done by enacting that whenever the relation of landlord and tenant should exist between any persons, the possession of the tenant should be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions are not to be made after those limited periods. (2 *R. S.* 294, § 13. *Code*, § 86.) This provision abrogates a technical rule, in favor of an actual possession, in good faith, of twenty years.

It was a principle of the common law that where a man was seised by any means whatsoever of the inheritance of a corporeal hereditament and died, whereby the same descended to his heirs, however feeble his right, the entry of any other person who claimed title to the freehold was taken away, and he could not recover possession against the heir by entry, but was driven to his action to gain a legal seisin of the estate. (3 *Bl. Com.* 176.) Such was the rule whether the seisin was by right or by wrong. (*Doe v. Thompson*, 5 *Cowen*, 371.) This rule was founded purely upon feudal reasons, and has been abrogated by the revised statutes. (2 *R. S.* 295, § 15. *Code*, § 87.) The remedy of the party claiming title is the same as in other cases where the possession is unlawfully withheld.

As the effect of the statute of limitations is to mature a wrong into a right by cutting off the remedy, after the assertion of it has been forborne for a specified period, it is obvious upon principles of natural justice, that the mere delay to bring an action against the party wrongfully in possession, should not mature into a title in favor of the wrongdoer, if the rightful owner labored under a disability. What shall amount to such disability has been uniformly expressed in our statutes on this subject. The existing statute of this state provides that if a person entitled to commence any action for the recovery of real property, or to make an entry, or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either 1, within the age of twenty-one years; or, 2, insane; or, 3, imprisoned on a criminal charge, or on execution upon conviction of a criminal offense for a term less than for life; or, 4, a married woman, the time during which such disability shall continue shall

not be deemed any portion of the time limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period. (2 *R. S.* 295, § 16, *as amended in 1849 and 1851. Code*, § 88.) This provision was taken from the former law, with some slight modification. (1 *R. L.* 185, 186.) In the former law, the proviso was in favor of a party *imprisoned*, without stating any particular circumstances, whereas the present law limits the imprisonment to such as arises on a criminal charge, *or in execution upon conviction of a criminal offense for a term less than for life*. A party imprisoned for *debt* only, is not within the exception, nor within the reason on which it is founded. A party imprisoned for life is civilly dead, and his case is elsewhere provided for.

There are various provisions in the statute of limitations with respect to the commencement of actions for the recovery of debts, demands or damages, which do not fall within the scope of this treatise.

The statute of limitations with respect to real property, does not begin to run from the time the tenant came into possession, but from the time of his holding adversely. (*Jackson v. Parker*, 3 *John. Ch.* 124.) If, therefore, a party enters without claim or color of title, and afterwards obtains a good or colorable title, the adverse possession will commence from that period. (*Same v. Thompson*, 16 *John.* 293. *Same v. Newton*, 18 *id.* 355.)

Nor does the law allow successive disabilities of different persons taking the same estate by devise or descent from each other. (*Carpenter v. Schermerhorn*, 2 *Barb. Ch.* 314.) Hence, when an adverse possession begins to run in the lifetime of the ancestor, it continues to run, though the land descends to a person under a disability. (*Jackson v. Moore*, 13 *John.* 513. *Same v. Robins*, 15 *id.* 169. *Fleming v. Griswold*, 3 *Hill*, 85.)

These principles were well illustrated in *Carpenter v. Schermerhorn*, (*supra*.) Though that case arose under the former statute, the principle is applicable to the existing code, which in this respect is the same. It was there said, that where a female having an interest in real estate, is under a disability in her lifetime, by reason

of coverture, which prevented her bringing an action of ejectment, her heirs must bring their suit within ten years after her death. And where one of those heirs was also a feme covert at the death of her mother, it was held that that circumstance would not have the effect to extend the period within which the ejectment must be brought.

The principle of not allowing successive disabilities in different persons was borrowed from the English decisions under a like provision of their statute of limitations. (*Doe v. Jesson*, 6 East, 80. 2 Prest. Abst. 341.)

The right of entry of a reversioner or remainderman, is not affected by the statute, if a particular estate existed when the right accrued. If the husband be tenant by the curtesy initiate, and the wife be disseised and die without entry, the statute does not run against the heirs until the husband's death. The heirs, in such case, have ten years after the death of the tenant by the curtesy to enter. (*Jackson v. Johnson*, 5 Cowen, 74. *Same v. Schoonmaker*, 4 John. 390. *Moore v. Jackson*, 4 Wend. 58. *Carpenter v. Schermerhorn*, supra.)

If the owner be a feme covert when the adverse possession commences, she is entitled to ten years after her disability ceases, and to twenty years in all, to bring her action. The time of her coverture during the adverse possession is not to be deducted from the twenty years. (*Wilson v. Betts*, 4 Denio, 201. *Clapp v. Bramaghan*, 9 Cowen, 530.)

The doctrine of adverse possession is essential to be known by the conveyancer. While land is held adversely, the person out of possession and claiming the title, cannot convey his right to a third person, though he may release to the party in the actual enjoyment of the land. His grant to a stranger is void, and passes no title to the grantee. (*Burhans v. Burhans*, 2 Barb. Ch. 398. *Jackson v. Demont*, 9 John. 55. *Same v. Oltz*, 8 Wend. 440. *Coe v. Irvine*, 6 Hill, 634.) The latter, therefore, cannot maintain an action upon it; and it is immaterial in a civil action, whether knowledge of this adverse possession was brought home to him or not.

But though the conveyance of land held adversely to the grantor is inoperative and void, against the person thus holding adversely, and those who afterwards come in under him, it is valid as to all the rest of the world, and passes the title from the grantor to the grantee. If, therefore, the adverse holder voluntarily abandons the

possession, the grantor may enter and enjoy the land; or if after such abandonment a stranger enters, the grantor may bring ejectment and oust him. (*Livingston v. Proseus*, 2 *Hill*, 526.) The statute (1 *R. S.* 739, § 147) declaring a deed of land held adversely to the grantor to be void, was for the benefit and protection of the claimant. If the person thus holding adversely, acknowledges the title of the claimant, his possession as to the latter ceases to be adverse. Much more, if when prosecuted at law by the claimant, he confesses the action, there is no longer any obstacle to a conveyance by the latter, of the land the title to which is so confessed. (*Kenada v. Gardner*, 4 *Hill*, 469; *S. C.* 3 *Barb.* 589.)

But the statutes against selling pretended titles in lands held adversely, (1 *R. S.* 739; 2 *id.* 691, § 5,) have no application to judicial sales. Such sales do not come within the mischief which the statutes were made to prevent. (*Tuttle v. Hills*, 6 *Wend.* 213, 224. *Truax v. Thorn*, 2 *Barb.* 156.)

In bringing this branch of the subject to a close, it is not deemed inappropriate to add a few remarks on the policy of the statute of limitations. There was a time when those statutes were viewed with disfavor, and when slight circumstances were considered sufficient to obviate their effect. But that day has gone by in this state, and they are now justly treated as statutes of repose, intended to quiet the possession of the actual occupant, and to repress the spirit of litigation. They are founded on the probability that after a long lapse of time the party may have lost the evidence necessary for his defense, or that those who could prove the lawfulness of their entry have departed this life. (*See remarks of Spencer, Ch. J. in Sands v. Gelston*, 15 *John.* 519, and in *Murray v. Coster*, 20 *id.* 586, 587.) They are founded too, in public policy—as was said by Lord Eldon in *Cholmondely v. Clinton*, (4 *Bli. R. Pt. 1*, p. 117,)—it is generally immaterial to the public at large whether A. or B. is the owner of a particular estate; but it is highly important that the person who is in possession should be the owner, for he is dealt with by all men as the owner, and therefore it is a consideration of public policy. The statutes of limitation, says his lordship, are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is in possession, having the credit attributed to that possession, should not be lightly disturbed.

The remarks of Lord Redesdale, in the same case, are to the like

effect; showing that courts of equity act upon the same principle, in cases not within the letter of the act, and which remarks are approved by our supreme court, in *Humbert v. Trinity Church*, (24 Wend. 607.)

3. *Of title by occupancy*, very little need be said, as it has ceased to exist in this state.

At common law, this right to real property extended only to a single case, namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only, without naming his heirs, for the life of another man, and died during the life of *cestui que vie*, or him by whose life it was holden; in this case, he that could first enter on the land might lawfully retain the possession so long as *cestui que vie* held by right of occupancy. (*Co. Litt.* 41 b.) It was not applicable to things lying in grant, or incorporeal hereditaments, for of them there could be no occupant. It was an incident of real estate only, and it is the only instance, says Blackstone, in which a title to real estate could be acquired by occupancy.

But this estate, even in England, is reduced to almost nothing by force of two statutes, namely, that of 29 Charles 2, ch. 3, and 14 George 2, ch. 10. By the first of which, an estate *pur auter vie* is devisable by will, and if not devised, was chargeable in the hands of the heir, if he came to it by special occupancy, as assets by descent; and by the other, that the surplus, after paying debts, should be distributed in a course of administration.

In this state, by the laws of 1813, it was enacted that estates *pur auter vie* were devisable by will, duly executed, and if not so devised, should go to the executors or administrators of the party who had the estate to be applied and distributed as part of the personal estate. (1 R. L. 365, § 4.) The revised statutes contain the same provision so framed as to exclude the title by occupancy altogether. They enact that an estate during the life of a third person, whether limited to the heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real. (1 R. S. 722, § 6.) And in another statute, the executors or administrators of the tenant for life are required to insert in the inventory of the testator or intestate, as part of the assets, all estates held by him for the life of another. (2 R. S. 82, § 6.)

Tenant for his own life, or for that of another person, is a freeholder during his life, and while conveyance by fine was a common

assurance in this state, he might levy a fine which would bind the remainderman and other strangers. Such a fine, it was held, divested and displaced the reversion or remainder, leaving only a right of entry in the reversioner or remainderman. (*Roseboom v. Van Vechten*, 5 Den. 424.)

But this mode of assurance is now abolished in this state. (2 *R. S.* 343, § 24.) And it is now declared that no greater estate or interest shall be construed to pass by any grant or conveyance, thereafter executed, than the grantor possessed at the delivery of the deed, or could then lawfully convey, except that every grant should be conclusive against the grantor and his heirs claiming from him by descent. (1 *R. S.* 739, § 143.)

SECTION III.

Of Title by Election and by Estoppel.

The doctrine of *election* and *estoppel* sometimes becomes material in considering the title to real property. The first more frequently arises in equity than at law, and is founded upon the principle that where a person claims under an instrument he must give effect to that instrument in full. He cannot put himself in a capacity to take under an instrument without performing the conditions of it, expressed or implied. Election, says the chancellor in *Broome v. Monck*, (10 Ves. 609,) is when the testator gives what does not belong to him, but does belong to another person, and gives that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty.

The case of *Smith v. Wyckoff*, (11 Paige, 49, 57,) is an illustration of this same doctrine. In that case the chancellor held that the devisee who takes a farm under the provisions of a will must give effect to it. As the testator had specifically charged certain notes upon the farm, it was held that the devisee of the same farm could not raise the question whether or not the notes were given for debts which the devisee was bound in justice and equity to pay. For, said the chancellor, if he claims under the will, he must take it subject to the payment of such debts as the testator thinks proper to charge him with, as a condition of such devise.

Estoppel is a mode of *preserving*, rather than of *acquiring*, property, inasmuch as a person is concluded by his own act from disputing the title of another. Estoppel is defined to be a conclusion, because a man's own act or acceptance stops or closes up his mouth to allege or plead the truth. (*Co. Litt.* 352 a.)

There is an analogy between the doctrine of election and the doctrine of estoppel, and some of the cases are used indiscriminately, to support or illustrate both. The doctrine of estoppel is more frequently applied to the law of pleading than to that of estates. But it is also connected with the title to real property. We shall therefore briefly notice it in this place.

Estoppels are of three kinds, namely, by matter of record, by matter in writing, and by matter *in pais*.

1. By matter of record, as by letters patent, verdict and judgment in a former suit. The general principle of law is that a decision of a court of competent jurisdiction is conclusive and binding on all courts of concurrent jurisdiction. (*Simpson v. Hart*, 1 *John. Ch.* 91.) Or as it is elsewhere expressed, the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or evidence conclusive between the same parties, upon the same matter directly in question in another court. (*Gardner v. Buckbee*, 3 *Cowen*, 120. *Burt v. Sternberg*, 4 *id.* 559.) It is final not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided. But to be a good bar, it must have been between the same parties, and for the same subject matter; and contingent remaindermen *in esse* are not bound by the decree, if they were not parties to the suit, though the owners of the particular estate were parties. (*Bruen v. Hone*, 2 *Barb.* 586. *Vail v. Vail*, 7 *id.* 226.)

To make a record in a former suit conclusive evidence on any point, it should appear from the record that such point was in issue. Other evidence cannot be received to show that a particular matter not in issue on the record came in question, or was taken into consideration by the jury. This rule, it will be seen hereafter, admits of qualification, in the case of general pleadings. Indeed, the verdict and judgment are not evidence, unless it be on the same point and between the same parties. (*Manny v. Harris*, 2 *John.* 24. *Maybee v. Avery*, 18 *id.* 352.)

But the *same point* may be said to arise collaterally as well as directly. In *Kingsland v. Spalding*, (3 *Barb. Ch.* 343,) the chan-

cellor said that the rule on this subject is, that a decree, sentence or judgment, of a court of competent jurisdiction, is conclusive upon the parties, in any future litigation of the same question between the parties to such decree, sentence or judgment, or those claiming under them; whether the question arises directly or collaterally in such subsequent litigation; provided the question is brought before the court in the proper form. When, says the chancellor, the former decision of the same matter can be set up in pleading as an estoppel, the party who wishes to avail himself of it must plead it in bar of the future litigation of the same matter. But in those cases where the forms of proceeding do not allow of special pleading, it may be given in evidence; and is conclusive upon the parties, the court and jury. (*Wright v. Butler*, 6 *Wend.* 284. *Young v. Black*, 7 *Cranch*, 565.)

It seems, however, to be well settled, that the former judgment is not *conclusive* except upon the matters directly in question in the former suit; but is not evidence of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment. In *Wood v. Jackson*, (8 *Wend.* 9,) the chancellor said that the former verdict, in order to operate as an estoppel, must be pleaded; and that when it is not pleaded, but merely relied on as evidence, it is not conclusive, but only *prima facie* evidence, which may be repelled by the party against whom it is urged. In the same case it seems to have been settled, that if it does not appear from the record that the verdict and judgment in the former suit were directly upon the point or matters which are attempted to be again litigated in the second action, the fact may be shown *aliunde*, provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that when approved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. (*Lawrence v. Hunt*, 10 *Wend.* 84, *per Nelson, J.*)

The reversal of a judgment destroys its efficacy as an estoppel as between the parties to it. (*Wood v. Jackson*, *supra.*) But an estoppel by record cannot be countervailed by argument, however conclusive. (*Mersereau v. Pearsall*, 5 *Smith*, 108.)

2. Estoppels by matter in writing arise under wills in some cases, but more frequently under deeds. 1. Under wills it has been held that an heir cannot take under and in hostility to the will. If he claim under the will, he must give effect to it so far as in his power.

(*Hawley v. James*, 16 *Wend.* 61.) A party claiming through deeds which recite a will is estopped from denying its validity and genuineness. (*Jackson v. Thompson*, 6 *Cowen*, 178.)

So, it was held in *Jackson v. Ireland*, (3 *Wend.* 99,) that by accepting a grant confirmatory of a will devising him a remainder, the grantee was estopped from setting up any title inconsistent with the will. And in another case, it was held that a recital in a will that a testator had executed a deed to the defendant, was evidence against the testator's heirs of a perfect execution of such deed, and of title in the defendant. (*Smith v. Wait*, 4 *Barb.* 28.)

But this doctrine of estoppel is confined within some reasonable bounds. A party is not estopped by his admission or assertion of a conclusion of law upon undisputed facts. Thus, where there had been a partition of real estate among devisees by action, and occupying under it, claiming as owners in fee, it was held that no estoppel was created, as against one of the devisees in favor of his judgment creditor, who purchased the share of such devisee, at a sale under his own execution, so as to prevent such devisee from showing, in order to defeat such purchaser's action of ejectment, that by the devise the legal estate was vested in the executors and not in the devisees, at the time of the docketing of such judgment, and, therefore, that such judgment was not a lien on the share of such devisee, and the purchaser acquired no right or title by his purchase at said sale. (*Brewster v. Striker*, 2 *Comst.* 19.)

2. Estoppels under deeds are more frequent than under wills. The general rule appears to be well settled, that recitals in a deed estop parties and privies. (*Jackson v. Parkhurst*, 9 *Wend.* 209. *Chautauque Co. Bank v. Risley*, 4 *Denio*, 480.) The grantor is estopped by a recital in his deed. (*Dennison v. Ely*, 1 *Barb.* 610.)

But a mere *general* recital cannot control the plain words of the granting part of a deed. Thus, where a deed of assignment by a debtor in trust for his creditors, recited that the debtor was desirous to convey his property, to secure three of his creditors named, in full, and the residue for the benefit of his other creditors; and in the body of the deed, the assignment was expressed to be in trust, to pay and satisfy those three creditors, and three others named, and the surplus to be divided among his other creditors; it was held that the three creditors named in the recital were only entitled to be paid ratably with the other three creditors, in proportion to their demands, out of the proceeds of the property assigned. (*Hun-*

tington v. Havens, 5 *John. Ch.* 23.) The *general recital* here was of an *intention* which was inconsistent with the plain language of the instrument, and could not control the latter.

But a recital in a deed of a *particular fact* may estop the party. (*Id.*) Thus a recital in a patent of a prior patent, *being a recital of a particular fact directly affirmed*, estops one claiming under it from denying the existence of such prior patent. (*Jackson v. Wilson*, 9 *John.* 92.) So also, the recital of a lease in a deed of release is conclusive upon parties in privity of estate. (*Carver v. Jackson*, 4 *Peters*, 1. This comes within the general nature of estoppel as laid down by Lord Coke. (*Co. Litt.* 352 b.)

There was a time for many years when it was held in this state that the grantee of the husband could not deny the seisin of the latter so as to defeat the claim of dower interposed by his widow in an action against her husband's grantee. (*Hitchcock v. Harrington*, 6 *John.* 290. *Same v. Carpenter*, 9 *id.* 344. *Collins v. Torry*, 7 *id.* 278, 282. *Davis v. Darrow*, 12 *Wend.* 65.) The soundness of these decisions was strongly questioned by Cowen, J. in *Sherwood v. Vandenburg*, (2 *Hill*, 308,) and by Bronson, J. in *Osterhout v. Shoemaker*, (3 *id.* 518,) and it was shown pretty clearly that the doctrine of estoppel had been misapplied in that and other kindred cases. It was shown that there was no mutuality between the grantee of the husband and the widow of the latter, that should estop the former from denying the seisin of the husband of such an estate as to entitle his widow to be endowed. But the supreme court felt themselves bound by the prior adjudications, and not at liberty to depart from them. At length the question came before the court of appeals in 1848, in the case of *Sparrow v. Kingsman*, (1 *Comst.* 242,) when the whole subject was fully and carefully considered by the whole court, and the doctrine of those cases was repudiated. In that case, it is true, the grantee held by *quit-claim* deed from the husband, and it was adjudged that he was not estopped by the grant from showing in an action of dower by the widow, that the grantor had not such an estate in the land as to entitle his widow to dower. The fact that the grantee held by *quit-claim deed* from the husband, does not seem to be important. For if he held under a warranty deed, he is under no obligation to surrender the land to the grantor or the widow. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.

As between landlord and tenant the general principle is that the latter cannot controvert the title of the former, under whom he holds, and which he has recognized. (*Ingraham v. Baldwin*, 12 Barb. 9; *S. C. affirmed on appeal*, 5 Seld. 45.) But this estoppel is not without its limitation. After the expiration of the lease, the lessee is no longer estopped by it to assert any right which he may have, though it be of such a character that he could not do so while the relation of landlord and tenant continued. (*Child v. Chappel*, 5 Seld. 246. *Jackson v. Rowland*, 6 Wend. 607.)

3. *Estoppels in pais*. An admission by the defendant intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction, is the very definition of an estoppel *in pais*. (*Per Cowen, J. in Dezell v. Odell*, 3 Hill, 215.) But a man can be estopped from denying only what he has once admitted. (*Despard v. Walbridge*, 1 Smith, 377, *per Selden, J.*)

An estoppel *in pais* is to be resorted to solely as a measure to prevent injustice—always as a shield but never as a sword. (*Pierrepont v. Barnard*, 5 Barb. 364.)

Estoppels *in pais* are not pleaded, but are in general given in evidence, and will *prima facie* operate as effectually to estop the party under the direction of the court. (*Welland Canal v. Hathaway*, 8 Wend. 480. *Reed v. Pratt*, 2 Hill, 64. *People v. Bristol and Rensselaer Turnpike Co.* 23 Wend. 222.)

This species of estoppel is sometimes connected with the title to real property. If a person having a conveyance of land, looks on and suffers another to purchase and expend money on the land without making known his claim, he will not be permitted afterwards to assert his legal title against an innocent purchaser. (*Wendell v. Van Rensselaer*, 1 John. Ch. 344. *Town v. Needham*, 3 Paige, 545.) So, if having the legal title, he acquiesces in the sale of the land by another, claiming or having color of title to it, he is estopped from afterwards asserting his title against the purchaser; especially if he has advised and encouraged the parties to the sale to deal with each other. (*Storrs v. Baker*, 6 John. Ch. 166.)

The abrogation of the doctrine which formerly prevailed with respect to remedies, preserving a distinction between such as are to be asserted at law and such as can be enforced only in equity, and blending the whole in one form of proceeding by the same court,

necessarily leads to a modification of some of the doctrines which we find in the cases decided prior to the constitution of 1846. What was said by the learned judge in *Levick v. Sears*, (1 *Hill*, 17,) that a person who stands by, and not only sees another buy, but advises him to do so, without disclosing the title which he afterwards sets up, is not estopped from asserting such title *at law*, cannot be upheld at the present day. If equity would not have permitted him formerly, under such circumstances, to assert his legal title, as it clearly would not, the same defense can now be interposed in a court having jurisdiction in law and equity, and administering, it may be, both remedies together.

Enough has been said to illustrate the principles applicable to this class of cases. It remains to be added that every estoppel ought to be reciprocal, that is, to bind both parties. It is for this reason that a stranger can take no advantage of estoppels, and is not bound by them. Estoppels bind only the parties to them, and *privies*. Of these there are three kinds: *privies* in blood, as the heir; *privies* in estate, as the feoffee, lessee, &c.; and *privies* in law, as the lord by escheat; tenant by the curtesy, tenant in dower, &c., who come under act of law, or in the *post*. (*Co. Litt.* 352 *b. Lansing v. Montgomery*, 2 *John*. 382.)

Again, every estoppel, because it concludes a man to allege the truth, must be certain to every intent, and not be taken by argument or inference. (*Co. Litt.* 352 *b.*)

No instrument in writing not under seal can be pleaded as an estoppel. The form of pleading an estoppel, is to rely on the deed as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts which the deed purports, without demanding judgment, *si actio*, &c. (*Davis v. Tyler*, 18 *John*. 492.)

SECTION IV.

Of Title by Alienation.

The last mode of acquiring and losing property, which we shall notice, is alienation. This is the most usual mode of exercising dominion over it; and it comprises every method whereby estates are voluntarily resigned by one person, and accepted by another. It embraces, also, such transfers of property as may be made by order of the appropriate tribunal, or under judgment and execution, against the owner.

In this state, especially since the abolition of entails, there has never been any restriction upon the power of alienation. The owner, having the *jus disponendi*, as incident of his dominion, has been permitted to transfer that ownership to others, at his pleasure.

The statute of *quia emptores*, 18 Edw. 1, which established in England the free right of alienation by the sub-vassal without the consent of his lord, was brought by our ancestors to the colony of New York, and became a part of its law and of the law of the state, independent of the statute of tenures enacted in 1787, which we have already noticed. (*Van Rensselaer v. Hays*, 19 N. Y. R. 68.) The owner, on parting with the fee, and retaining no *reversion* or *possibility of reversion* therein, could not at any time annex any condition to his conveyance, that would prevent his alienee from the disposition of the property. It was only where he retained some reversion in himself that he could annex a condition in restraint of alienation. (*De Peyster v. Michael*, 2 Seld. 467.)

It does not fall within the scope of this treatise to give a historical sketch of the law of alienation, as it has existed in England at various times, or as it exists in that country at this time.

In a former chapter (*Part 1, ch. 1, § 11,*) we treated, to a certain extent, of the persons capable of holding and conveying land. It may be added, that in general, all persons capable of holding real estate, may freely alienate the same, unless he is under some disability; such as idiocy, lunacy, infancy, or coverture. With respect to persons under disability at common law, to deal with their estates, we shall see, in its proper place, that wise and provident provisions are made by the statutes of the state, by which the real property of such persons may be sold or incumbered.

The only restriction which exists against the sale and purchase of real property is our statute, which declares void every grant of land, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. (1 R. S. 739, § 147.) But this provision does not prevent the person having a just title to lands, of which there shall be an adverse possession, from executing a mortgage on such lands. And such mortgage, if duly recorded, binds the lands from the time the possession thereof shall be obtained, by the mortgagor or his representatives. The mortgage has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are several mortgages, they have preference

severally according to the time of recording the same respectively. (*Id.* § 148.)

In addition to the provision avoiding the conveyance of lands held adversely, the statute has made it a misdemeanor, punishable by fine and imprisonment, for any officer, judicial or ministerial, or other person, to take a conveyance of any lands or tenements, or of any interest or estate therein, from any person not being in possession thereof, while such lands or tenements shall be the subject of controversy by suit in any court, knowing the pendency of such suit, and that the grantor was not in possession of such lands and tenements. (2 *R. S.* 691, § 5.) This section, it has been held, does not apply where the person in possession does not hold adversely to the grantor; and, therefore, it is not forbidden to take a conveyance from a party in possession of lands, although they be the subject of controversy by suit in court. (*Webb v. Bindon*, 21 *Wend.* 98.)

The subsequent section of the same statute goes further, and forbids the buying or selling, or in any manner procuring, or making or taking any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant, shall have been in possession, or he, and those by whom he claims, shall have been in possession of the same, or of the reversion or remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made; and it makes the violation thereof a misdemeanor. But the two last sections do not apply to any mortgage executed by a person not in possession, allowed to be given by the statute before cited, nor to any conveyance of lands and tenements to any person in the lawful possession thereof. (*Pepper v. Haight*, 20 *Barb.* 429) Maintenance is no longer an offense here, except as to buying and selling pretended titles, and falsely suing and maintaining suits. (*Small v. Mott*, 22 *Wend.* 403, *affirming previous case*, 20 *id.* 212.) The party in possession may quiet his title by purchasing in any outstanding claims.

But these statutes against selling pretended titles, or lands held adversely, have no application to judicial sales nor to decrees. (*Tuttle v. Jackson*, 6 *Wend.* 213. *Truax v. Thorne*, 2 *Barb.* 156. *Varick v. Jackson*, 2 *Wend.* 166, *affirming* 7 *Cowen*, 238.)

With regard to the kind of conveyances, which are recognized by the law, it may be remarked that some are made by the parties

themselves, and take effect in their lifetime; others are made through the intervention of the court, or of some public officer acting by its direction; and others not to take effect until after the death of the party making them, which is the case of devises by a last will and testament.

It is more convenient to treat, in subsequent successive chapters, of these three kinds of common assurance.

CHAPTER V.

OF THE ALIENATION OF REAL ESTATE BY THE VOLUNTARY ACT OF THE PARTIES INTER VIVOS.

SECTION I.

Of Alienation by Deed.

A deed, as defined by the elementary writers, is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to the things contained therein. (*Shep. Touch.* 50.) Coke says it is an instrument consisting of three things, viz: writing, sealing and delivery, comprehending a bargain or contract between party and party, man or woman. (*Co. Litt.* 171 *b.*) And Blackstone more briefly defines it, as a writing sealed and delivered by the parties.

It is said to be called a deed, in latin *factum*, because it is the most solemn and authentic act that a man can perform, with relation to the disposal of his property. We have seen, in a previous chapter, that a man is estopped by his deed, and not permitted to aver and prove any thing to the contrary. Deeds at common law were of two kinds, 1, deed poll, which is executed only by the grantor, and 2, *deeds indented*. The latter are often called *indentures*. An indenture is an agreement between two or more persons, whereof each party has usually a part. That part which is executed by the grantor is usually called the original, and the rest are counterparts. With us, most frequently, all the parties execute every part, which renders them all originals. The practice which formerly prevailed here, was to cut the paper or parchment on which an indenture was written in an undulating line. This, in the time of Lord Coke, was deemed indispensable to an indenture.

(*Co. Litt.* 229 a.) A deed poll was shaved even across the top. But these formalities are obsolete, and have long since ceased to be deemed of any importance.

The New York revised statutes abolished the mode of conveying lands by feoffment with livery of seisin; (1 *R. S.* 738, § 136;) and all fines and common recoveries. (2 *id.* 343, § 24.) They doubtless intended to substitute a grant for the former modes of assurance. And hence they enacted that every grant in fee of a freehold estate shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its delivery, according to the provisions of the revised statutes, its execution and delivery must be attested by at least one witness; or if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged. (1 *id.* 738, § 137.) It is, however, well settled by the courts, that whether acknowledged or attested by a subscribing witness or not, it is valid between the parties, and takes effect, as to prior incumbrancers, at the time of its execution. (*Wood v. Chapin*, 3 *Kern.* 509. *Voorhees v. Presbyterian Church of Amsterdam*, 17 *Barb.* 108, *per Hand, J.*)

At common law, a grant was the name of a conveyance of incorporeal hereditaments. They were said to lie in *grant*, as lands and tenements were said to lie in *livery*. The legislature adopted the name *grant*, and applied it to the instrument intended for the conveyance of a fee, or a freehold estate; and the act declares that it shall take effect so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law in force, at the adoption of the revision, (1830,) in respect to the delivery of deeds, were declared to be applicable to grants thereafter to be executed. (1 *R. S.* 738, § 138.)

Prior to 1788, the most usual mode of the conveyance of land in this state, was by lease and release. On the declaration, in that year, by the act for the amendment of the law, and the better advancement of justice, that from and after the first day of May, 1788, none of the statutes of England or of Great Britain should operate or be considered as law of this state, (2 *Greenl.* 116, § 37,) that form of conveyance immediately fell into disuse, and the conveyance by bargain and sale took its place, and has ever since been the most frequent mode of alienation amongst us, and was the one principally in use at the time the statutes were revised, in 1830.

The conveyance by lease and release was, however, occasionally employed. And hence, the statute provided that deeds of bargain and sale, and of lease and release, might continue to be used, and be deemed grants, and subject to all the provisions in the statute concerning grants. The statute also declared that no covenants shall be implied in any conveyance of real estate, whether such conveyance contains covenants or not, and that lineal and collateral warranties, with all their incidents, should be abolished. The statute contains suitable provision for subjecting heirs and devisees to a liability upon the covenants and agreements of their ancestor or deviser to the extent of the lands descended and devised, which will be noticed in their proper place. (1 R. S. 739, §§ 141, 142.)

Although the statute evidently gave a preference to a *grant* as the mode of passing the title to the fee and freehold, so that there need be but one form of conveyance, and that applicable to both corporeal and incorporeal hereditaments, it did not abrogate any other mode of conveyance known to the law before, except the *feoffment*, and conveyances by fine and recovery. It expressly, as before observed, retained the bargain and sale, and lease and release; and by necessary consequence, left all other forms of alienation as they were before. Hence deeds of surrender, assignment, confirmation, exchange, &c. may still be used, if desired by the parties. It would seem, however, that a *grant* would be equally effective, and supersede the necessity of any other form. No greater estate can be made to pass by it, than the grantor possessed at the time and could lawfully convey; and it is conclusive against him and his heirs claiming under him by descent. It is also conclusive against subsequent purchasers from the grantor or from his heirs claiming as such, except a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first recorded. (1 R. S. 739, §§ 143, 144.)

Our examination of the law in relation to conveyances of real estate is not much abridged by the revised statutes. The doctrine in relation to the circumstances necessary to constitute a valid deed is the same which formerly prevailed. The conveyance itself, whether it be in form a grant, under our statute, or a bargain and sale, is still denominated, *in common parlance*, a deed; and it will so continue to be called for ages to come. Very little, if any thing, has been gained by the change of name of the conveyance;

or by the substitution of an instrument, originally designed for the transfer of incorporeal interests, as a conveyance of corporeal hereditaments. Hence it is proper, in the further consideration of this subject, to inquire into the circumstances necessary to the valid execution of deeds. In this sense, a grant is a deed, and requires the like formalities for its validity.

All deeds, whether deriving their effect from the common law, or from the statute of uses, do immediately upon their execution by the grantor divest the estate out of him, and put it in the party to whom the conveyance is made, though in his absence, and without his knowledge, till some disagreement to such estate appears. (1 R. S. 738, § 138. *Cruise's Dig. tit. 32, ch. 1, § 25. Cunningham v. Freeborn*, 11 Wend. 240. *Jackson v. Bodle*, 20 John. 184, 187.) This doctrine is founded upon the principle that the assent of the party who takes may be implied; 1st, from the beneficial nature of the instrument; 2d, from the incongruity that would arise from a perfect execution on the part of the grantor, which cannot be if the estate still remains in him; and 3d, unless it so vests, there would be an uncertainty as to where the freehold was vested. The New York statute, as explained in *Cunningham v. Freeborn*, (*supra*,) seems to take this view of the subject. If the conveyance casts a burden on the grantee which he desires not to assume, there can be no doubt that he can decline to accept. There can be no valid delivery without an acceptance, though the presumption is in favor of the latter when the first is proved. (*Jackson v. Phipps*, 12 John. 418, 422.)

The practice is quite common of entering into *articles of agreement*, preparatory to the execution of a formal deed, where the one party has agreed to purchase, and the other to sell, any real estate. This article contains a memorandum of the agreement, in which the mutual stipulations of the parties are set forth with more or less formality. Such articles contain a trust which courts of equity will enforce by a specific execution of the agreement. It is, therefore important that they be drawn with care, and contain, with reasonable certainty, the agreement of the parties. Under the New York revised statutes a contract for the sale of lands is void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party by whom the sale is to be made, or by his agent lawfully authorized. And where the contract has not been signed, either by

the vendor or his agent, it is not binding upon the vendee, although he has subscribed the same. The authority of the agent is not required to be in writing by the statute of frauds. If lawfully authorized by parol, he can bind his principal by a valid signing of the executory contract. (2 R. S. 134, § 8, *et seq.* *McWhorter v. McMahan*, 10 Paige, 386. *Townsend v. Hubbard*, 4 Hill, 351.) The statute does not require an executory agreement for the conveyance of land at a future day, to be under the seal of any of the parties. It is good and obligatory, whether it be under seal or not.

SECTION II.

Of the requirements essential to a Deed.

Our remarks under this section are applicable to grants, and to all other instruments in writing and under seal, which fall within the appropriate definition of a deed.

From the definition of a deed, given in the preceding section, and from a reference to the revised statutes, on the subject of alienation by deed, it is obvious, that the following circumstances are essential to a deed: 1. Proper parties and subject matter. 2. A good and sufficient consideration. 3. Writing on paper or parchment. 4. Words sufficient to express the agreement, legally and orderly set forth. 5. Reading, if desired. 6. Sealing and signing. 7. Delivery. 8. Attestation by witnesses. 9. Acknowledging, or proving. 10. Recording in the proper county, and in the proper book.

1. The parties to a deed may be either natural persons, or artificial, as a corporation. With respect to the first, as a general rule, it may be laid down that all persons who have attained the age of twenty-one years, of sound mind and understanding, and are not under any legal disability, may convey to others whatever interest they have in real estate. Though such person be blind, deaf or dumb, he can convey his land by deed. Those infirmities do not prevent a party from making a will. (*Willard on Executors*, 69, 70.) And on the same principle they will not disable the owner from conveying his estate *inter vivos*. Though born deaf and dumb, and having continued so from his nativity, he is still capable of executing a deed, if of sufficient capacity. (*Brown v. Brown*, 3 Conn. 299.) In cases of this kind, and indeed in all cases where the mental capacity is in any respect doubtful, care should be

taken to explain the nature of the transaction, so as to make it understood by the grantor.

An idiot or lunatic is incapable of binding himself by deed. But mere imbecility of mind, not amounting to idiocy or lunacy in the grantor, is not sufficient to avoid the deed, though it should insure caution in those who are called upon to decide upon the validity of the acts of such persons. The definition of the term idiot and lunatic, seems to comprehend only those who show a total want of understanding, in the first, from nativity, and in the second, at the time of doing the act which is brought in question. (*Odell v. Buck*, 21 Wend. 142. *Jackson v. King*, 4 Cowen, 207, approved in *Stewart's Ex. v. Lispenard*, 26 Wend. 298, and *Blanchard v. Nestle*, 3 Denio, 37.) In the latter of which cases, the common law notion of idiocy and lunacy, is fully set forth by the learned judge.

A civil corporation may, in general, convey its lands like a natural person; but religious corporations are under a disability in this respect, except by the permission of the supreme court, or some tribunal having the requisite authority. But this matter will be considered more at large in the following chapter.

Married women, at common law, could not alien their lands during the coverture. They were permitted to do so by joining with their husband in the conveyance, and acknowledging, on a private examination before a proper officer, that they executed the deed freely, without any fear of their husband. By some recent statutes, a married woman of lawful age can, in certain cases, alien her real estate in the same manner as if she was sole. This branch of the subject belongs to the next chapter, where it will be treated at large.

By the common law, all natural persons may be grantees in a deed, because it is supposed to be for their advantage. But if such grantees are infants, married women, or persons of insane memory, they may disagree to such deeds, and waive the estates thereby conveyed to them.

A grant to be valid, must be to a corporation, or to some certain person named who can take by force of the grant, and hold in his own right, or as trustee. A grant to the people of a county is void. Formerly, counties were not esteemed a corporate body; and it was well settled, that a community, not incorporated, could not purchase and take in succession. (*Jackson v. Corry*, 8 John. 388.)

So a grant to the inhabitants of a town, not incorporated, was held to be void. (*Hornbeck v. Westbrook*, 9 *id.* 73.) But by the revised statutes each county is made a corporate body, with capacity to purchase and hold lands within its own limits, and for the use of its inhabitants. (1 *R. S.* 364.) Strictly speaking, and in the absence of any legislative provision on the subject, the acts and proceedings by, to, and against a county, should be in the name of the board of supervisors of such county, as a board, and not of the individuals by name; but the statute has provided that every conveyance of land within the limits of the county, made, in any manner, for the use or benefit of its inhabitants, shall have the same effect, as if made to the board of supervisors. (*Id.* *Hill v. The Board of Supervisors of Livingston Co.* 2 *Kern.* 52. 23 *Barb.* 338.) The statute has also given to the several towns in the state a certain corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. (1 *R. S.* 337. *Lorillard v. The Town of Monroe*, 1 *Kern.* 394. *Denton v. Jackson*, 3 *John. Ch.* 320.) But neither a county or a town can hold lands out of their respective limits, unless specially authorized by statute; nor for purposes not connected with their business and duties as a county or a town. They cannot embark in the business of buying and selling lands for the purpose of profit. The intention of the law doubtless was to give them respectively a corporate capacity to take and hold lands for a court house, jail, poor house, town house, and the like. The general law for the incorporation of villages, (2 *R. S.* 701 *et seq.* 5th *ed.*) gives to such villages when incorporated a corporate capacity to hold lands within their limits for various purposes, and in some cases they are specially authorized to take and hold lands without their corporate limits for a cemetery for the burying of the dead. The power of holding real estate is possessed to more or less extent by all our cities and villages heretofore incorporated, as will be seen by reference to their charters; but it is not deemed necessary to insert a reference to them in this treatise.

2. With regard to the consideration, it was not deemed essential at common law, to the validity of a deed, that it should express a consideration. (*Cunningham v. Freeborn*, 11 *Wend.* 248.) And so, under the revised statutes, a conveyance actually delivered and accepted of all the real estate of a party, is good and valid as

a grant, although there be no express consideration to support it. This is so, whether the grant be a beneficial one, or in trust for the payment of debts, and in the latter case it is unnecessary that the creditors should be parties to it. (*Id.*)

But although a deed be good between the parties, and effectual to vest the estate of the grantor in the grantee, without any consideration being expressed therein, yet such deed may be impeached by creditors of the grantor for fraud. A man in unembarrassed circumstances may, if he pleases, give his property to a friend or a stranger, and in the absence of fraud or imposition, the courts will not interfere with it. Even a voluntary deed is not void in law, as made to defraud creditors, if the grantor had, at the time, enough other property to pay all his debts. (*Jackson v. Post*, 15 *Wend.* 588.) Indeed, the distinction which had previously been supposed to exist between fraud in fact and fraud in law, in voluntary conveyances, seems to have been repudiated in subsequent cases. (*Seward v. Van Wyck*, 8 *Cowen*, 406. *Jackson v. Peck*, 4 *Wend.* 300. *Same v. Timmerman*, 7 *id.* 437.) In the case of a voluntary conveyance, as much as in any other, the question is as to the actual fraud, and is to be passed upon by the jury. Where there is *any* valuable consideration, the deed is not voluntary, and the adequacy of it is only material upon the question of fraudulent intent. (*Id.*)

There are various reasons why it is advisable that a deed should express the consideration on which it is granted. Courts of equity never lend their aid to carry into execution voluntary conveyances. There must either be a good or a valuable consideration, or something equivalent thereto. (*Minturn v. Seymour*, 4 *John. Ch.* 497. *Acker v. Phoenix*, 4 *Paige*, 305. *Willard's Eq. Jur.* 263.) If the deed requires the aid of a court of equity to vary its terms, it will not be granted in favor of a volunteer.

A voluntary conveyance may become valid upon matter *ex post facto*, or it may acquire validity so far as concerns the claims of others. (*Wood v. Jackson*, 8 *Wend.* 9.)

Considerations are of two kinds, *good* and *valuable*. The first is merely a moral consideration; such as arises from an implied obligation, and which subsists between parent and child. The love and affection subsisting between near relatives, and the desire of preserving his name and family, are frequently held to be good considerations. The second, called a valuable consideration, is money

or other valuable thing. Marriage is a valuable consideration. (*Whelan v. Whelan*, 3 Cowen, 537. *Verplank v. Sterry*, 12 John. 536.)

3. The third essential circumstance to the validity of a deed is, that it must be written or printed on paper or parchment. If it be made on a piece of wood, or upon a piece of linen, or on the bark of a tree, or on a stone or the like, and the same be sealed or delivered, it is no deed. (*Co. Litt.* 229 *a.*) The reason assigned for this, by Coke, is that a writing upon paper or parchment is less subject to alteration or corruption than upon the other substances.

It is usual that the instrument is written or printed and subscribed with ink, as that is in general the most durable, and most difficult to be effaced. But with regard to the note or memorandum of the agreement which the statute of frauds requires to be in *writing*, and *subscribed* by the party to be charged, (2 *R. S.* 134, § 6,) it has been held in this state, both by the supreme court and the late court of errors, that a memorandum written and subscribed with a lead pencil, was as valid as if written with pen and ink. (*Merritt v. Classon*, 12 John. 102; *affirmed on error*, 14 *id.* 484, *by name of Classon v. Bailey*, and *approved by the same court in the later case of Davis v. Shield*, 26 Wend. 354.) It appears by the note of the revisers, that the opinion of Chancellor Kent in *Classon v. Bailey*, (*supra*,) was before the legislature, when the statutes were revised in 1830, and with a knowledge of what he had said on the subject, they left the language of the statute of frauds in that respect unaltered. The statute, the chancellor observed, requires a *writing* &c., but does not tell us with what instrument it may be written. He then proceeds thus: "To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetical writing as well as we do, but it is certain that the use of paper, pen and ink was for a long time unknown to them. In the days of Job they wrote upon lead, with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, &c. with a style or iron instrument. The next improvement was writing on waxed tables; until at last paper and parchment were adopted, when the use of the calamus or reed was introduced. The common law has gone so far to regulate

writings as to make it necessary that a deed should be written on paper or parchment, not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument, or the material by which letters were to be impressed on paper or parchment, has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on the subject, the courts have, with great latitude and liberality, left the parties to their own discretion." He then adverts to the well known fact, that it has long been held that *printing* is writing, and making a mark is a *subscribing* within the meaning of the law, and that the ecclesiastical courts had admitted to probate a codicil to a will written in pencil. And he fully concurred in opinion with the supreme court, which upheld the validity of the agreement written by a lead pencil. The court of errors unanimously agreed with him. (*See Willard on Executors*, 113.)

The question whether a *deed* written and subscribed with a lead pencil, is valid, does not seem to have arisen. It is the most prudent course to continue the use of pen and ink until the legislature or the higher courts sanction a different mode.

4. The next circumstance to be noted is, that the deed must contain proper words for expressing the contract, and that they should be legally and orderly set forth. Although the statute does not prescribe the different parts of a deed, and the omission of all but the granting part would not invalidate the instrument, it is nevertheless the more correct and lawyer-like mode of conveyancing, to adhere to forms which have been long established and sanctioned by general usage.

The orderly parts of a deed are, 1. The premises; the office of which is rightly to set down the names of the parties, grantor and grantee, together with their place of abode, or other matter of description, the recital if there be any, the consideration and the receipt thereof, the grant, the description of the thing granted, and the exception if there be any. 2. The *habendum* and *tenendum*, the office of which is to set forth the kind of estate which is granted, for what time and the tenure by which held. These are not essential parts of our deeds, if the quantity of interest conveyed has been already stated in the premises. They are merely inserted in pursuance of custom. 3. The *redendum*, which is that by which

the grantor reserves something to himself, as the payment of rent in a lease. 4. The condition, of which enough has been said in a previous chapter. 5. The warranty. 6. The covenants, if any. 7. The conclusion, in which is set forth the date, if it has not already been inserted. (*Shep. Touch.* 52. *Cruise's Dig. tit. 32, Deed, ch. 2.* 2 *Bl. Com.* 297 et seq.)

5. The fifth circumstance essential to a deed is, that it be read if either of the parties so require. If it is not read, it is void as to the party who required it to be read. If he can, he should read it himself; if he be blind or illiterate, another must read it for him. It may always be read by another at the request of the parties, and is usually read by the scrivener. If it be read falsely it will be void. In *Lansing v. Russell*, (13 *Barb.* 510,) the supreme court said that a deed in the nature of a testamentary instrument, purporting to be signed by his mark by the grantor, who at the date of the deed was in his 90th year, partly deaf and nearly blind, and who was laboring under a disease which rendered him nearly helpless, and which deed was in the handwriting of the husband of the grantee, and witnessed only by her son, and which recited in the body of it that the object of the deed was to place the grantee upon a footing of equality with the other children of the grantor, requires for its support something more than the proof of the subscribing witness that he saw it executed by the grantor. If the condition of the grantor be such as to throw a doubt over his capacity to make a deed; if he be greatly infirm, or his mind imbecile, the instrument should, before it is executed, be distinctly read or explained to the grantor, by a disinterested party, who should also subscribe his name as a witness to its execution. (*See also Lansing v. Russell*, 3 *Barb. Ch.* 325.)

But a deed will not be avoided on the ground of fraud or mistake, because the whole was not read by the grantor. (*Jackson v. Corey*, 12 *John.* 427.)

6. The sixth circumstance is that the deed should be subscribed and sealed by the party whose deed it is. A scrawl with a pen of the letters L. S., or any other words, is not a seal, within the meaning of the law. In some of the states it is understood that such letters added to the signature constitute a seal, and will thus turn a simple contract into a specialty. But it is not the law of this state. With us a seal is wax or wafer with an impression. It is

immaterial of what the wax is composed. It must obviously be some tenacious matter, that will receive an impression and adhere to the paper. (*Warren v. Lynch*, 5 *John*. 239.)

The legislature have so far changed the common law in this respect, as to allow the impression of the seal of any court by stamp, to be a sufficient sealing in all cases where sealing is required. (2 *R. S.* 276.) And by other statutes, the same provision is extended to the seal of public officers, the seal of notaries public, and the common seal of incorporations. (*L. of 1859*, p. 883. 2 *R. S.* 404. *Act of 1848*, ch. 197, § 1. 3 *R. S.* 687, 5th ed.)

Several persons may bind themselves by one seal. (*Mackay v. Bloodgood*, 9 *John*. 285. *Townsend v. Hubbard*, 4 *Hill*, 351.)

The real estate of a corporation can be conveyed by it only in its corporate capacity, and not by the individual members of the corporation, or the stockholders. (*Wilde v. Jenkins*, 4 *Paige*, 481.) At common law the seal of a corporation, like that of an individual, was void unless impressed on wax or some other adhesive substance. (*The Farm. & M. Bank v. Haight*, 3 *Hill*, 493.) But by the act of 1848, already cited, in all cases where a seal of any corporation is authorized or required, the same may be affixed by making an impression directly on the paper, which is thus made as valid and effectual as if on a wafer or wax. This statute extends to municipal corporations, as well as to civil and religious corporations. It puts those bodies having a common seal, on the same footing, in this respect, as courts and public officers. The statute had a retrospective operation upon deeds made by the corporation of the city of Albany.

The seal of a corporation should be affixed by the officer to whom the custody of it is confided, by the direction of the managing officers of the institution, and not without. In the absence of all proof to the contrary, the court will perhaps presume, when the instrument is signed by the proper officer, that the seal was affixed by him by the express authority of the trustees. (*Jackson v. Campbell*, 5 *Wend.* 575.)

Where a power to sell is conferred upon a corporate body, the deed should be executed in the name and under the seal of the corporation. But that rule was held not to apply where the trustees of a gospel lot were declared by law to be a corporation, and were by name of trustees authorized to take possession, lease or sell the lot. Such an authority, the court thought, was well executed by the

individual trustees, under their hands and seals, describing themselves as such trustees in the deed. (*De Zeng v. Beekman*, 2 *Hill*, 489.)

7. The seventh requirement is that the deed be *delivered* by the party himself or his attorney. The deed takes effect from its delivery, and not from its date, unless the latter be coincident with the delivery. (*Jackson v. Bard*, 4 *John*. 230. *Same v. Schoonmaker*, 2 *id.* 230. *Carver v. Jackson*, 4 *Pet.* 1-22.)

It has sometimes been said that the date is presumptively the time of the execution of the deed. But it has been held, that since the revised statutes, (1 *R. S.* 738,) there is no such presumption as to a deed not acknowledged or proved, and having no subscribing witness. And the presumption in all cases fails where there is positive proof that it was in the hands of the grantor after the day of its date. (*Elsey v. Metcalf*, 1 *Den.* 323.) And where there is positive evidence that it was not executed till sometime after its date, the date is no evidence whatever of the time of its execution. (*Costigan v. Gould*, 5 *id.* 290.)

Though a deed cannot in general be contradicted by parol evidence, yet such evidence is competent to show that the deed, though it be in the hands of the grantee, was in truth never delivered. (*Roberts v. Jackson*, 1 *Wend.* 478.)

The deed of a corporation, it is said, does not need a delivery. The affixing of the corporate seal gives perfection to it, without further ceremony, if it be done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. (*Derby Canal Co. v. Wilmot*, 9 *East*, 360.)

The usual way of delivering a deed, as described by the text writers, is to take it up and say, "I deliver this as my act and deed." It is in general recommended to those engaged in the business of conveyancing, to use some words like the above, or of equivalent meaning, when the instrument is delivered. The repeating of some such formula at the time of the execution of the instrument, is calculated to impress the fact upon the recollection of the witnesses, and to obviate all subsequent disputes on the subject. But a *formal* delivery is not essential; it is sufficient that such acts

appear as show an intention to deliver. (*Goodrich v. Walker*, 1 *John. Cases*, 250.)

In general the deed should be delivered to the grantee, or to some one authorized by him to receive it, or it may be to a stranger for the use of the grantee, without any authority from the latter. It has been held that the delivery of a deed to the clerk of the county for the use of the defendant was a perfect delivery to the grantee; and upon the acceptance by the latter the deed took effect from the time of such delivery. (*Rathbun v. Rathbun*, 6 *Barb.* 98, 103. *Elsey v. Metcalf*, *supra*.) The subsequent assent of the grantor, in cases of this kind, is equivalent to an original authority, and the deed becomes valid from the time of the original delivery. (*The Lady Superior v. McNamara*, 3 *Barb. Ch.* 375. *Church v. Gilman*, 15 *Wend.* 656. *Souverybye v. Arden*, 1 *John. Ch.* 240.) But in all cases where the deed is delivered to a third person for the use of the grantee, without the authority of the latter, such delivery is invalid, unless the grantee assent thereto. If the delivery to such third person be absolute, the grantor *not reserving any future control over the deed*, the estate passes; the assent of the grantee to accept the conveyance being presumed, from the fact that the conveyance is beneficial to him. (*Church v. Gilman*, *supra*.)

The delivery of a deed may be to the party himself or to a stranger for his use absolutely; or it may be delivered to a third person to keep till something be done by the grantee and then delivered to the latter. This is called delivering the deed as an *escrow*. An escrow takes effect only from delivery on performance of the condition. Such deed does not take effect until the condition is performed and the deed is delivered over, and in the mean time the estate remains in the grantor. (*Green v. Putnam*, 1 *Barb. S. C. R.* 500. *Jackson v. Rowland*, 6 *Wend.* 666. *Frost v. Beekman*, 1 *John. Ch.* 288. 18 *John.* 544.)

Where a deed is delivered as an escrow, and either of the parties dies before the condition is performed, and afterwards the condition is performed, the deed is valid and takes effect from the first delivery. Thus, where A. having executed a deed of lands in consideration of natural love and affection to two of his sons, and delivered it to C., to be delivered to them in case A., the grantor, should die without making a will; A. having died without making a will, C. delivered the deed to the sons. This was held to be effectual from the first delivery. (*Ruggles v. Lawson*, 13 *John.* 285.) So, also,

when a deed of lands was delivered as an *escrow*, and an *absolute* delivery was subsequently made; but previous to the second delivery a judgment was obtained against the grantor, under which the land was sold, it was held that the purchaser under the judgment was entitled to the land. (*Jackson v. Rowland, supra.*)

Two things are to be attended to in the delivery of a deed as an escrow: 1. It must be delivered to a stranger; for if it be delivered to the party himself to whom it is made, or his agent, as an escrow, upon certain conditions, the delivery is absolute and the title passes, and the grantee is not bound to perform the condition. (*Worrall v. Munn, 1 Seld. 229.*) 2. Apt words should be used indicating an intention that the title shall not pass until the condition be performed. The form of words laid down in the Touchstone, (p. 59,) slightly altered to conform to our practice, is: "I deliver this to you as an escrow, to deliver to the grantee as my deed upon condition that he delivers to you one hundred dollars," (or any other sum agreed upon, or upon his performing certain other specified conditions, as the case may be.) If, says the Touchstone, when I deliver the deed to the stranger, I shall use these or the like words: "I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or I deliver this to you as my deed, to deliver to the grantee when he comes to London;" in these and the like cases, the deed takes effect presently, and the grantee is not bound to perform the conditions. Note the diversity. In the proper form of this conditional delivery, the words, *as an escrow*, are made to qualify the delivery by the grantor to the stranger, and his right to deliver it over, is also made subject to a condition. In the latter form, the title passes by the first delivery to the stranger. It is, therefore, inconsistent with the rights of ownership, that the handing over the deed to the grantee should be conditional.

8. The eighth circumstance is the attestation of the instrument by the attesting witness. A deed is good as between the parties without any attesting witness, or acknowledgment; and at common law, it was good as against all the world. The statute which declares that such deed shall not take effect as against purchasers or incumbrancers until acknowledged, refers to subsequent purchasers and incumbrancers. (1 R. S. 738, § 137. *Wood v. Chapin, 3 Kernan, 509.*) The requirement of one or more subscribing witnesses to the execution of a deed, or an acknowledgment, or proof of its ex -

ecution before a public officer, is a statute regulation which is different in the different states; and which, prior to the revision of the laws in 1830, was different in this state, at different times.

With regard to what is a good attestation by a witness, it is generally understood that a subscribing witness is one who was present when the instrument was executed, and who *at that time* subscribed his name to it as a witness of the execution. (*Henry v. Bishop*, 2 Wend. 575.) The witness need not be present at the moment of the execution. If he is called in by the parties immediately afterwards, and told by the grantor that it is his deed, and requested to sign his name as a witness, it is enough. The execution by the parties and the subscribing by the witness, are thus considered as parts of the same transaction. (*Hollenbeck v. Fleming*, 6 Hill, 305.)

If there be no subscribing witness to the deed, and a question arises as to its execution on the trial of a cause, proof of the handwriting of the grantor, by any person acquainted with it, is admissible evidence. The execution of it may also be proved, in such a case, by a witness who was present and saw it executed, though he did not subscribe his name as a witness. If, however, there was a subscribing witness, he must be called or his absence accounted for; as by showing that he is dead, or out of the jurisdiction of the court, or the like. The necessity of calling the subscribing witness, when he can reasonably be procured, arises from the reason, that he is the person selected and agreed on by the parties, as the witness to their act in making the instrument, with the attending circumstances. Where there is a subscribing witness, who can be called, it is not competent to permit another person, who was present at the execution of the instrument, but who was not then requested to attest it, to add his name at a subsequent day, without the request of the parties, and thus become a witness instead of the one who signed at the time of the execution. (*Henry v. Bishop*, 2 Wend. 575. *Hollenbeck v. Fleming*, *supra*.) Proof of the confession or acknowledgment of the party that he executed the deed, will not be a substitute for the testimony of the subscribing witness. (*Id.*)

In *Jackson v. Phillips*, (9 Cowen, 113,) the chief justice, speaking of the execution of a deed, says: "If the parties choose to sign their names alone, and then call witnesses before whom they acknowledge the instrument, that is a good execution. And should

some time intervene, (years if you please,) I can see no difference. It is a redelivery of the deed, which then, at least, becomes effectual. This evidence would be good and sufficient to prove the deed in a court of law, and therefore is sufficient before the judge or commissioner." This doctrine is questioned by Bronson, J. in *Hollenbeck v. Fleming*, (*supra*.) It is an authority at least to show that a deed is good between the parties without a subscribing witness. Whether such an acknowledgment would entitle the deed to be recorded, and to relate back to the original signing, will be hereafter considered. (*Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103, *as to validity of an unwitnessed deed*.)

The statute does not say who may or may not be witnesses to a deed. It is the most discreet course for the conveyancer to permit none but a competent, as well as credible and disinterested person, to be a subscribing witness. In case a question of mental capacity should arise with respect to the validity of the deed, the testimony of credible and disinterested witnesses, of good character, would weigh more than that of witnesses of a different description; especially as their opinions on the capacity of the grantor are, within certain limits, admissible. (*DeWitt v. Baily*, 17 N. Y. R. 340. 5 Seld. 371. *Culver v. Haslam*, 7 Barb. 314.) The relation which the subscribing witness bore, at the time, to the parties, is always open to observation in case of a controversy about the execution of the deed. (*See Lansing v. Russell*, 13 Barb. 510, 524.) It will be shown, under the next head, that the witness should not only be competent, but disinterested. (1 R. S. 759, § 17.)

9. The *ninth* circumstance is that the deed should be acknowledged before a proper officer, or the proof of its execution made by one of the subscribing witnesses before such officer. We have seen under the preceding head, that an unattested deed is valid between the parties. But under our statutes it is a matter of great importance, that a deed should be not only attested, but acknowledged or proved before a proper officer. It is enacted that every conveyance, acknowledged or proved and certified in the manner required by the act, by any of the officers duly authorized for that purpose, may be read in evidence without further proof thereof, and shall be entitled to be recorded. (1 R. S. 759, § 16.) The record of a conveyance duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original

conveyance. Neither the certificate of the acknowledgment, or of the proof of any conveyance, nor the record, or transcript of the record, of such conveyance, shall be conclusive, but may be rebutted, and the force and effect thereof may be contested by any party affected thereby. If the party contesting the proof of a conveyance shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such conveyance nor the record thereof shall be received until established by other competent proof. (*Id.* § 17. *Clark v. Nixon*, 5 *Hill*, 36. *Dempsey v. Tylee*, 3 *Duer*, 73.) In this way the subscribing witness may be impeached, as well as if he had been sworn on the trial of the cause, and may doubtless in like manner be supported.

As the revised statutes have now been in force more than thirty years, and the principles on which they are based have not been essentially changed since that time, it will rarely be necessary to look into the laws with respect to the acknowledgment and proof of conveyances at an earlier day. It is quite certain that prior to 1710, deeds were not only acknowledged, but also proved by the subscribing witness, before the officer who allowed them to be recorded. A transcript of such deed as well as the record of it was evidence. (*Van Cortland v. Tozer*, 17 *Wend.* 338; *S. C. in error*, affirmed, 20 *Wend.* 423, 427.)

There are numerous cases in our reports in relation to these ancient deeds, but it is not deemed important to occupy any space with a description of them. (*See Jackson v. Schoonmaker*, 2 *John.* 330; *Same v. Woodruff*, 15 *id.* 89.)

The existing laws on the subject are the revised statutes of 1830, (1 *R. S.* 756,) and the several statutes on the same subject which will be found collected in 3 *R. S.* 45 *et seq.* 5th ed.* Most of the subsequent statutes relate to the persons before whom the deed may be proved or acknowledged, when executed out of this state. It does not seem expedient to advert more fully to those statutes. If the deed be acknowledged or proved in this state, it may be done before any of the justices of the supreme court, judges of county courts, mayor and recorders of cities or commissioners of deeds, or justices of the peace of towns. But no county judge or commissioner of deeds can take such proof or acknowledgment out of the city or county for which he was appointed. Formerly the proof or

* This portion of the existing statutes is inserted in the Appendix.

acknowledgment could be taken before the chancellor, circuit judges and supreme court commissioners; but when those offices were abolished by the constitution of 1846, those duties were devolved on the judges of the supreme court and county judges. By the act of 1840, ch. 238, the office of commissioner of deeds was abolished, and the powers and duties of such commissioners were directed to be executed by the justices of the peace in the several towns respectively.

The statute requires that no acknowledgment of any conveyance having been executed shall be taken by any officer, unless the officer taking the same shall know, or had satisfactory evidence that the person making such acknowledgment is the individual described in, and who executed such conveyance. (1 *R. S.* 758, § 9.) The object of this provision was to guard against the fraudulent personation of the grantor. Previous to the act of February, 1797, relative to the acknowledgment of deeds, it was not necessary that the certificate should state the fact that the officer knew the person who made the acknowledgment to be the grantor described in the deed, or that his identity was proved. (*Bradstreet v. Clark*, 12 *Wend.* 673.) The act of 1794, relative to conveyances of military bounty lands, (3 *Web. L.* 45,) which required an actual acknowledgment by the grantor, prohibited the officer from taking the acknowledgment unless he knew, or had satisfactory proof, that the person making the acknowledgment was the same person described in the conveyance; but it did not require that fact to be stated in the certificate. This defect was supplied by the act of 1798. (*Crowder v. Hopkins*, 10 *Paige*, 188.)

The foregoing section relates to the acknowledgment by a party who is *sui juris*, and not under disability. If the grantor be a married woman residing in this state, her acknowledgment is not to be taken, unless, in addition to the requisites contained in the ninth section, she acknowledge, on a private examination apart from her husband, that she executed the same freely and without any fear or compulsion of her husband; nor shall any estate of any such married woman pass by any conveyance not so acknowledged. (1 *R. S.* 778, § 10.)

This statute has led to some controversy. In *Dennis v. Tarpey*, (20 *Barb.* 371,) the officer who took the acknowledgment of a married woman, instead of certifying as the law required, "that it

was taken on a *private* examination of the wife apart from her husband, and that she executed the same freely and without any fear or compulsion of her husband," stated that on an examination before him of the wife, "*separate* and apart from her husband, she acknowledged the execution of the same without fear or compulsion from him." This was held to be a sufficient compliance with the act. It is not necessary that the certificate should be in the precise words of the statute, though it is recommended that it should be, as being better calculated to avoid disputes. In *Merriam v. Harsen*, (2 Barb. Ch. 232,) the officer omitted to certify that it was executed by the wife "*freely*," though it was stated to be "without any fear, threat or compulsion of her husband." This was held to be sufficient.

The legislature, in 1848 and 1849, removed, to a limited extent, the disability of coverture, in the alienation of the real estate of the wife, which she has taken by inheritance or by gift, grant, devise or bequest, from any person other than her husband. She is allowed to hold such property to her sole and separate use, and to convey and devise the same, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried. The same property so acquired is exempted from the disposal of her husband, and is not liable for his debts. (*L. of 1849, p. 528.*) The supreme court has decided, with reference to such cases, that the wife need not acknowledge the execution of the instrument by which she conveys her land, thus acquired, on a private examination apart from her husband; or that she executed the same freely without any fear or compulsion of her husband. The court thought that it was the intention of the legislature to remove the disability which both the common law and the statute had thrown around married women, not only as regards their right to take and hold, free and independent of their husbands, but also as to their power of alienation by grant or devise. (*Blood v. Humphrey, 17 Barb. 660.*)

The real property of which she was seised or possessed prior to the marriage is not affected by the statutes of 1848 and 1849. The act of 1860, ch. 90, allows a married woman to bargain, sell and convey such property, and enter into any contract in reference to the same, but it declares that no such conveyance or contract shall be valid without the assent in writing of her husband; except in case such assent cannot be procured in consequence of his refusal,

absence, insanity or other disability, in which cases leave to make such conveyance may be granted by the county court of the county where she resides. The assent of the husband would doubtless be well given by his uniting with the wife in the conveyance, in which case it should be acknowledged by them both, as in other cases of deeds by husband and wife. If in consequence of his refusal or inability to unite with her in the deed, and she executes it under the direction of the county court, the certificate of acknowledgment should probably have some reference to the authority by which she acts. But we are at present without any adjudged cases on the subject.

At common law, a married woman could not convey her lands by deed, either with or without the concurrence of her husband. But by usage, and the laws of the colony and state of New York, a married woman might, before the late statutes, convey her lands, or any interest she might have in lands, by deed duly acknowledged; and such conveyance was valid although her husband did not join therein. (*The Albany Fire Ins. Co. v. Bay*, 4 *Comst.* 9.) In cases not within some special statute, the deed of a feme covert is not binding upon her until acknowledged; and her subsequent acknowledgment has no retrospective operation. This is the same whether she executes the deed alone, or in conjunction with her husband. (*Jackson v. Stevens*, 16 *John.* 110. *Same v. Cairns*, 20 *id.* 301. *Knowles v. McCamly*, 10 *Paige* 342. *Elwood v. Klock*, 13 *Barb.* 50.) If the wife be an infant, her uniting with her husband, and acknowledging the due execution of the instrument, will not give it effect. Such instrument so executed is void. The disability of infancy is not removed by any of these statutes. (*Sanford v. McLean*, 3 *Paige*, 117.)

At common law, the only mode in which a married woman could alienate her lands was by fine and recovery. (*The Albany Fire Ins. Co. v. Bay*, *supra.*) These modes of conveyance, we have seen, are abolished in this state, and the disabilities of coverture, with regard to the alienation of the property of the wife, have been greatly modified or wholly removed.

At common law, the wife cannot convey her lands by deed directly to her husband; but she could indirectly accomplish the same object, by uniting in a deed with him to a third person, who then reconveyed to him alone. (*Jackson v. Stevens*, *supra.*)

If the deed be executed by a corporation, or by the attorney of the grantor, the attorney in the one case, and the proper officer of the corporation in the other, are the persons who may make the acknowledgment. It is impossible that a corporation aggregate should execute or acknowledge a deed in person. The officer of the corporation intrusted with its common seal, and who subscribes his name to the deed as the evidence that he is the person who has affixed the common seal to the same, stands also in the character of a subscribing witness to the execution of the deed by the corporation; and may be examined by the officer taking the proof to prove that the seal affixed by him is the common seal of the corporation, whose deed the conveyance or instrument to which it is affixed, purports to be. (*Lovett v. The Steam Saw Mill Association*, 6 Paige, 60. *Johnson v. Bush*, 3 Barb. Ch. 207.)

A deed executed by an attorney may be recorded, upon his acknowledgment before the proper officer, or upon proof that such deed was executed by him, without proving the power under which the attorney acted in executing such deed. (*Johnson v. Bush*, *supra*.)

The more usual course, in case of deeds by a corporation, is to take the evidence under oath of the officer by whom the corporate seal is affixed, stating his own authority, that he knows the corporate seal, and that the same was affixed to the conveyance by order of the board of directors, or other trustees of the corporation, and that he subscribed his name thereto as a witness to the execution thereof. (*Lovett v. Steam Saw Mill Association*, *supra*.) [See form in the Appendix.]

The foregoing observations relate to the execution of deeds or other instruments, by persons in this state. If the grantors be non-residents, or the instrument be executed abroad, but within the United States, it must be taken before some one of the officers authorized to take the proof or acknowledgment of deeds in such cases. Those persons are, the chief justice and associate justices of the supreme court of the United States, district judges of the United States, the judges or justices of the supreme court, superior or circuit court of any state or territory within the United States, and the chief justice or any associate judge of the circuit court of the United States in the District of Columbia: but when taken by such officer it must, to be effectual, be taken within some place or territory to which the jurisdiction of the court to which he belongs ex-

tends. (1 *R. S.* 757, § 4, *sub.* 2.) A great variety of other officers abroad are authorized to take the proof and acknowledgment of deeds; in addition to which the governor is authorized to appoint and commission officers in other states and territories, with the like power. (*See these acts collected*, 3 *R. S.* 46 *et seq.* 5th ed. *See Appendix.*)

The statute also gives to a conveyance of her real estate executed by a married woman not residing in this state, when she joins with her husband in such deed, the same effect as if she were sole; and allows it to be proved or acknowledged in the same manner. (1 *R. S.* 758, § 11.) The same principle has been applied, by a subsequent statute, to a power of attorney for the conveyance of real estate, executed by a non-resident married woman with her husband, for the conveyance of real estate situated in this state. (*L. of 1835, ch. 275.*)

No acknowledgment of any conveyance having been executed can be taken by any officer, unless the officer taking the same knows, or has satisfactory evidence that the person making such acknowledgment is the individual described in and who executed such conveyance. (*Id.* § 9.) And when the proof of a conveyance is made by a subscribing witness thereto, he must state his own place of residence, and that he knew the person described in and who executed such conveyance. And this proof is not to be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to such instrument. (*Id.* § 12. *Jackson v. Osborn*, 2 *Wend.* 555. *Same v. Gould*, 7 *id.* 364.)

The officer who takes the proof or acknowledgment of any conveyance is required to indorse a certificate thereof signed by himself, on the conveyance; and in such certificate he is required to set forth the matters required to be done, known or proved, on such acknowledgment or proof, together with the names of the witnesses examined before him, and their places of residence, and the substance of the evidence given by them. (*Id.* § 15.) The officer need not certify that he knew the witness who identified the subscribing witness; it is the latter, namely, the *subscribing* witness, that the officer must know. But the statute does not require the officer to have knowledge of the identifying witness. (*Jackson v. Harrow*, 11 *John.* 434. *Same v. Vickory*, 1 *Wend.* 406.)

The certificate of the officer is made by statute evidence of certain facts, and it, therefore, requires no proof of its genuineness, where on its face it appears to be regular. It is received without proof of the *official character* of the officer granting it, of his *signature*, or that it was granted *within the jurisdiction* where he was authorized to act. The evidence is only *prima facie*, and may be rebutted. (*Thurman v. Cameron*, 24 Wend. 87.)

If the subscribing witness to any conveyance be dead, and it be desired to have the instrument proved and recorded, it may be proved before any officer authorized to take the proof and acknowledgment of deeds, other than commissioners of deeds and county judges not of the degrees of counsel in the supreme court. It cannot be made before a justice of the peace, who now takes the place of commissioner of deeds. The proof of the execution of the conveyance, in such case, must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor; all which evidence, with the names and places of residence of the witnesses examined before him, must be set forth by the officer taking the proof in his certificate of such proof. The conveyance so proved and certified is permitted to be recorded in the proper office, if the original deed be at the same time deposited in the same office, there to remain for the inspection of all persons desiring to examine the same. (1 R. S. 761, §§ 30, 31, 32.)

10. The tenth and last circumstance required to complete the deed or conveyance so as to give it full and perfect effect against all the world, is to record it in the county where the lands lie. By the common law every deed took effect according to the priority of its date or delivery. Subsequent purchasers or mortgagees were required to take notice at their peril of antecedent conveyances. An unrecorded deed was always good against the grantor and his heirs. (*Jackson v. West*, 10 John. 466.) And would be good against every body but for the statute.

The whole object of the recording acts, says the chancellor, in *Stuyvesant v. Hall*, (2 Barb. Ch. 158,) is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, &c. which are not recorded; and to deprive the holder of the prior unregistered conveyance or mortgage of the right which his priority would have given him at common law. The recording of a deed

or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor.

It is true the language of the first section of the act is that every conveyance not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. (1 R. S. 756, § 1.) But this, as was well remarked by Beardsley, J. in *Raynor v. Wilson*, (6 Hill, 473,) is not to be taken literally in favor of *any* and *every* subsequent purchaser of the same real estate, without regard to the person of whom the purchase is made. That would lead to absurd consequences, and the section should not receive such an interpretation. It applies to successive purchases of the same real estate *from the seller*, and must be limited to cases of that description. This is plain enough on the words and spirit of the section already referred to; but the statute contains another section which declares, that "every grant shall also be conclusive as against subsequent purchasers from such [i. e. *the same*] grantor, or from his heirs claiming as such, except a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded." (1 R. S. 739, § 144.) These sections being *in pari materia*, must be construed in reference to each other; and they leave no doubt of the sense in which both are to be understood.

The recording acts protect none but innocent and *bona fide* purchasers and holders of real estate. And none should be deemed *bona fide* purchasers who purchase with knowledge or notice of a defect in the title. The recording of a deed is constructive notice to all the world of its existence. There is no difference between the effect of such notice, on a question of superiority of title, and an *actual notice*, so far as respects the person receiving such actual notice. (*Schutt v. Large*, 6 Barb. 373.)

When any conveyance is proved or acknowledged before any judge of the county courts, not of the degree of counsellor at law in the supreme court, or before any commissioner of deeds, while that office was in being, and now before any justice of the peace, it is not entitled to be read in evidence, or to be recorded in any other county than that in which the said officer shall reside, unless in addition to the other requisites there shall be subjoined to the certificate of

proof, or acknowledgment required by such judge or commissioner, a certificate under the hand and official seal of the clerk of the county, in which such officer resides at the time of taking such proof or acknowledgment, specifying that such officer was duly authorized to take the same, and that the said clerk is well acquainted with the handwriting of such officer, and verily believes that the signature to the said certificate of proof or acknowledgment is genuine. (1 R. S. 759, § 18.) The certificate of the proof or acknowledgment of every conveyance, and the certificate of the genuineness of the signature of any judge or other officer, in the cases where such last mentioned certificate is required, must be recorded with the conveyance so proved or acknowledged; and unless the said certificates be so recorded, neither the record of such conveyance, nor the transcript thereof, shall be read in evidence. (*Id.* § 20.)

In order that the transcript of a deed can be used in evidence, it must include not only the deed but the certificate of proof or acknowledgment, and the certificate of genuineness when there is one. (*Morris v. Keyes*, 1 *Hill*, 540.) The court can thus determine whether the deed was properly proved or acknowledged, and properly recorded. If the proof was defective, and the instrument improperly recorded, it is not notice for any purpose, nor legitimate evidence. It is only when it has been *duly* recorded, that the record or a transcript is evidence. It is then made *primary* evidence of the contents of the deed. (*Clark v. Noxon*, 5 *Hill*, 36.)

In addition to the officers before mentioned, who are authorized to take the proof and acknowledgment of deeds, there are various others in different parts of the state, possessing the like power by local and special statutes. It is not deemed important to give a reference to these, as they are not of general interest.

The object of the recording laws is not solely to afford notice to subsequent purchasers and incumbrancers of the existence of the conveyance; but to preserve the evidence thereof for the benefit of the parties interested, and their heirs. Besides the facility which they afford to purchasers and others to investigate the title, they preserve the evidence of such title from the contingency of loss or destruction.

It is well calculated to facilitate the search in the public records to have those of the same kind, as far as practicable, inserted in the same book. A proper classification is an economy of time. Hence the statute has provided that different sets of books shall be

provided by the clerks of the several counties for the recording of deeds and mortgages; in one of which sets all conveyances absolute in their terms, and not intended as mortgages, or as securities in the nature of mortgages, must be recorded; and in the other set, such mortgages and securities must be recorded. (1 R. S. 756, § 2.)

A deed conveying real estate, though absolute in its terms, which by any other instrument in writing shall appear to have been intended only as a security in the nature of a mortgage, is considered as a mortgage; and no advantage can be derived by the person for whose benefit it is made, from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time. (*Id.* § 3.)

In cases of this kind, both the deed and defeasance should be recorded in the book of mortgages. If the deed is intended only as a mortgage, there can be no good reason why the terms on which it is defeasible should not appear on its face. If, through inadvertence, it is taken as an absolute deed, the holder may comply with the terms of the statute, by making a written defeasance, specifying the conditions on which it was intended to be given, and recording both together in the book of mortgages. If he does this before the rights of any third party have intervened, he will be protected. And if he neglects it, he will only be in the same situation of every other mortgagee who neglects to have his security recorded. (*White v. Morse*, 1 *Paige*, 554. *Day v. Dunham*, 2 *John. Ch.* 188. *James v. Johnson & Mowry*, 6 *id.* 417; *S. C. in error*, 2 *Cowen*, 248. *Jackson v. Van Valkenbergh*, 8 *id.* 260.)

If a deed absolute on its face, but intended as a security for a debt, be recorded as a deed, it is valid and effectual between the parties as a mortgage; but it is liable to be defeated by a subsequent mortgage duly recorded. (*James v. Johnson*, *supra.*) A conveyance and separate defeasance constituting a mortgage, must be recorded together as a mortgage, or they will be void as against a subsequent *bona fide* purchaser for value. (*Brown v. Dean*, 3 *Wend.* 208.) And if an absolute deed be taken, whether the defeasance is by writing or parol, it must be recorded as a mortgage, otherwise it is not protected against subsequent *bona fide* purchasers or mortgagees. (*White v. Moore*, *supra.*) When an absolute deed is intended as a mortgage, a subsequent purchaser with notice

stands in the place of the equitable mortgagee. (*Williams v. Thorn*, 11 *Paige*, 459.)

In some cases where it is doubtful in which book the conveyance should be recorded, the provident and cautious conveyancer will advise that it be recorded in both books, as a deed and as a mortgage.

A deed or mortgage improperly recorded, as where the proof of its execution, or the acknowledgment was defective, or insufficient, is not available as notice. (*Frost v. Beekman*, 1 *John. Ch.* 300.)

The regularity of the proof or acknowledgment requires that it should be done before a proper officer. The statute forbids any judge of any court from sitting in any court, in any cause, in which he is a party, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity, or affinity to either of the parties. (2 *R. S.* 275.) If the taking the proof or acknowledgment of a deed be a judicial act, the officer would be incompetent to act if he stood in such relation to the grantees as would render him incompetent as a juror. This question has actually arisen in this state, and it has been decided that the officer who takes the proof or acknowledgment of a deed does not act judicially, but ministerially; and therefore if he be an heir, for example, of the grantor, he is competent to act. (*Lynde v. Livingston*, 8 *Barb.* 463; *affirmed on appeal*, 2 *Seld.* 422.)

SECTION III.

Of avoiding a Deed, by matter ex post facto.

It was resolved in *Pigot's case*, (11 *Co.* 27 *a.*) that when any deed is altered in a material point, by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing a pen through a line, or through the midst of any material word, that the deed thereby becomes void. The case before the court in which the decision was made, was that of a bond, in which the question was whether the plaintiff could, after such alteration, maintain an action thereon. The same doctrine is laid down in the *Touchstone*, page 69.

This doctrine is no doubt applicable to an action on the covenants in a deed. On the principle of *Pigot's case*, the party in whose favor a covenant was made, cannot maintain an action thereon against the covenantor, if the former has made a material alteration without authority, in the deed which contains the covenant.

If a deed be valid in its inception and be delivered to the grantee, a subsequent erasure, alteration or even cancellation of the instrument, will not reinvest the title in the grantor. (*Nicholson v. Halsey*, 1 *John. Ch.* 417. *Smith v. McGowan*, 3 *Barb.* 404. *Raynor v. Wilson*, 6 *Hill*, 469. *Schutt v. Large*, 6 *Barb.* 373.)

If the erasure be made by consent of the parties, it does not invalidate the deed; and the fact may be proved by any person cognizant of it, whether he be the subscribing witness or not. (*Penny v. Corwithe*, 18 *John.* 499. *Woolley v. Constant*, 4 *John.* 54.)

In commenting on Pigot's case, the chancellor, in *Waring v. Smith*, (2 *Barb. Ch.* 133,) said that the modern and more sensible rule is, that an alteration if made by a party claiming to recover on the bond or instrument, or by any person under whom he claims, renders the deed void; but that an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, when the contents of the same, as it originally existed, can be ascertained.

The chancellor also, in the same case, takes a distinction between deeds which operate to convey the title to property, and those which merely give a right of action. For when the legal title to real estate passes to the grantee by the execution and delivery of a deed, a fraudulent alteration of the deed, by such grantee, will not have the effect to revest the title in the grantor, in cases where the statute of frauds requires a written conveyance to transfer the title. (*Doe v. Archbishop of York*, 6 *East*, 86. *Mitler v. Mainwaring*, *Cro. Car.* 397. *Lewis v. Payn*, 8 *Cowen*, 71.) In this class of cases it is held that the title to the estate which was vested in the grantee by a genuine and valid conveyance, remains in the grantee, although he destroys or makes void the deed itself, by a forgery or a voluntary cancelment of the conveyance which created that title. But the deed itself is avoided thereby; so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed as an existing and valid instrument.

But a deed is not destroyed by the tearing off of the seals or other cancellation by a stranger, without the privity or consent of the parties. (*Every v. Merwin*, 6 *Cowen*, 360. *Rees v. Overbaugh*, *id.* 746.) Nor does any unauthorized and unratified alteration by a stranger have that effect. (*Waring v. Smith*, *supra.*)

In case an alteration or erasure appears in a material part of the deed, sufficient to avoid it, if fraudulently made, the prac-

tical question arises as to the party upon whom the burden of proof is cast. If the alteration was made before the execution of the instrument, and noted by the subscribing witness, or by the officer who takes the acknowledgment, it is conclusive evidence that the party so executing or acknowledging the instrument, with the knowledge of the alteration, assented thereto, or ratified it. (*Id.*) But if the alteration or erasure be material, and is not so noted, either by the witness or the officer taking the acknowledgment or the proof, the party claiming the benefit of such apparent alteration, as part of the instrument, is bound to give some explanation; and the sufficiency of this explanation, when given, is for the consideration of the jury. (*Jackson v. Osborn*, 2 *Wend.* 555. *Herrick v. Malin*, 22 *id.* 388. *Waring v. Smith*, *supra.*) This explanation may be given by oral evidence dehors the deed, or the explanation may appear upon the face of the deed itself.

The conveyancer should endeavor so to draw the instrument that it will be without blemish, after it is executed. If, unfortunately, some alteration in a material part has to be made, and the parties do not call for a re-engrossment of the deed, the alterations or defects should be distinctly specified and noted by the witness or the acknowledging officer.

SECTION IV.

Of the Construction of Deeds.

It is a cardinal rule in the construction of deeds, that it be made on the entire deed, and not merely upon a particular part of it; and therefore every part of a deed ought, if possible, to take effect, and every word to operate. A deed, and especially a deed poll, is always construed most strongly against the grantor. If a deed cannot operate in the manner intended by the parties, the judges will endeavor to construe it in such a way as that it shall operate in some other manner; it being the maxim *quando quod ago, non valet ut ago, valeat quantum valere potest*. Per Spencer, Ch. J. in *Jackson v. Blodget*, (16 *John.* 168;) *Same v. Myers*, (3 *id.* 395.)

The *intent*, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. (Per Kent, Ch. J. in *Jackson v. Myers*, *supra.* *Same v. Beach*, 1 *John.* Cases, 402.)

If, however, the intention be contrary to the rules of law, it is

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otherwise. The rules of law will prevail against the intention. The example given to illustrate this is, if a person should grant land to a man and his heirs for twenty-one years, the executors of the grantee, and not his heirs, would be entitled to the land on the death of the grantee before the expiration of the term. This results from the rule of law that a term for years is a chattel interest which goes to the personal representatives, and not to the heir. (2 R. S. 82, § 6.)

A deed must receive its legal construction according to its language and subject matter. (*Per Woodworth, J. in Jackson v. Tibbits*, 9 Cowen, 250.) The maxim in the books is, *quoties in verbis nulla ambiguitas, ibi nulla expositio contra verba fienda est.* (*Broom's Max.* 477.) This maxim applies as well to deeds as to wills. Too much stress should not be laid upon particular words when the intention is clear. It is the duty of the court to make a deed effective if possible. *Ut res magis valeat quam pereat.* (*Fish v. Hubbard's Adm.* 21 Wend. 654.)

In case of a *patent* ambiguity, *ambiguitas patens*, that is, an ambiguity which appears on the face of the instrument, no averment is allowed to explain it. Such ambiguity, Bacon says, is never helped by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so in effect, that to pass without deed, which the law appoints, shall not pass without deed. (*Fish v. Hubbard's Administrators*, *supra*, p. 659.)

A latent ambiguity is such as is created by extrinsic proof, and may be removed in the same way. *Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.* (*Broom's Maxims*, 468.) If a grant should be made to John Styles of Saratoga, and it should be shown by extrinsic evidence that there are two persons of that name in the same place, parol evidence would be admissible to show which John Styles was intended by the grantor. Here, then, is no ambiguity in the instrument itself, but the ambiguity is created by the proof; and it may therefore be removed in the same way.

But suppose the grant should be made to one of the sons of J. S., or if there be a blank left in the deed or will, for the name of the grantee or devisee, it is not admissible to prove by parol what per-

son was probably intended by the grantor or deviser. In this latter case the ambiguity is patent. It appears on the face of the instrument, and is not created by any extrinsic proof.

Where the language of a deed will bear more than one interpretation, looking only to the instrument, the court will look to the surrounding circumstances existing when the contract was made, such as the situation of the parties and of the subject matter of the contract. (*Per Jewett, Ch. J. in French v. Carhart*, 1 Comst. 102. *Sevick v. Sears*, 1 Hill, 17.)

Where the words of an ancient deed are *equivocal*, the usage of the parties, under the deed, is admissible to explain it. (*Livingston v. Ten Brock*, 16 John. 14.) But if the words be not ambiguous or equivocal, evidence of usage to control the effect or operation of the deed, is inadmissible. (*Parsons v. Miller*, 15 Wend. 561.)

Several instruments of the same date, between the same parties, and relating to the same subject, may be construed as parts of one assurance. (*Jackson v. Dunsbagh*, 1 John. Cas. 91. *Stow v. Tift*, 15 John. 458.)

When the deed may enure several ways, the grantee shall have his election which way to take it. An uncertainty shall be taken in favor of the grantee. (*Jackson v. Hudson*, 3 John. 375. *Same v. Gardner*, 8 id. 394.)

The rule in the construction of deeds is, that if a general clause be followed by special words which accord with the general clause, the deed shall be construed according to the special matter; but that if a deed contain special words, and conclude with general words, the general as well as the special words shall stand, for *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa*. (*Per Kent, Ch. J. in Munroe v. Alaire*, 2 Caines, 327. *Altham's case*, 8 Co. 154 b.) Thus, where in an assignment made by a debtor, in trust for several creditors, it was expressed to be an assignment of all the property, goods, chattels, debts, &c. of the debtor, particularly described in a schedule annexed and referred to; it was held that this was not a general assignment of all the debtor's estate, but was to be construed to operate only on the articles specified. (*Wilkes v. Ferris*, 5 John. 335.) In this case, though the words in the first place were general and broad enough to cover all the debtor's estate, they were afterwards limited by the special words.

A recital in a deed cannot control the plain words in the grant-

ing part of the instrument. (*Huntington v. Havens*, 5 *John. Ch.* 23.)

The construction of a grant is matter of law, but its legal effect, deducible from its terms, or from matter subsequent, which by showing the sense of the parties, may authorize a larger or narrower construction, so as to include or exclude the premises in controversy, is matter of fact for the jury to decide. (*Frier v. Van Allen*, 8 *John.* 495.)

When the words of a deed are so uncertain that the intention of the parties cannot be discovered, the deed is void. This uncertainty may be with reference to the person of the *grantee*, or the description of the thing granted. An instance of the first is, of a gift to A. or B., or to one of the children of J. Z., he leaving four children: such a gift is void for uncertainty of the person. (*Cruise's Dig. tit.* 32, *ch.* 20, § 24.) The case of *Rollin v. Pickett*, (2 *Hill*, 552,) affords an instance of the second kind. In that case one party agreed to convey to another seventy acres of land at twenty dollars an acre, payably in a certain described way. In an action on the contract it was held to be void for want of a description of the land.

In relation to sheriffs' deeds, it has been repeatedly held that a deed is void when the description is so general that the lands cannot be located by the deed. (*Jackson v. Roosevelt*, 13 *John.* 97. *Same v. De Lancy*, *Id.* 537.) So when the deed is illegible, or so as to leave it uncertain what is conveyed, the deed is inoperative. (*Jackson v. Ransom*, 18 *John.* 107.) But though the description be imperfect, if enough be given to locate with reasonable certainty the premises sought to be conveyed, it will be sufficient to pass the title. (*Dygert v. Pletts*, 25 *Wend.* 402. *Jackson v. Parkhurst*, 4 *id.* 369. *Corbin v. Jackson*, 14 *id.* 619. *Jackson v. Livingston*, 7 *id.* 136.)

There is, in general, more danger of error in the description of the premises, than in the person of the grantee. If in the description there are particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the deed. But where the description of the estate intended to be conveyed, includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree with every particular. (*Jackson v. Clark*, 7 *John.* 217.) If the words *with the dwelling house thereon*, be inserted in the description, when in fact there is

no dwelling house on the premises claimed under the deed, it is merely a false circumstance, which does not control the rest of the description, or defeat the grant. (*Id.*)

Land may be described by the number of the lot in a certain patent, and may refer to the map on which it is laid down. In such case the whole lot passes, notwithstanding it is described in the deed as containing a less number of acres than it actually contains. The reference to the number of acres in a grant is generally mere matter of description. (*Jackson v. Deiffendorff*, 1 *Caines*, 493. *Mann v. Pearson*, 2 *John*. 37.)

Where the courses and distances are given in a grant, as well as monuments, and the quantity of land is given, the latter is mere matter of description and not of covenant. (*Jackson v. McConnell*, 19 *Wend.* 175. *Root v. Puff*, 3 *Barb.* 353.)

Where there is a known and well ascertained place of beginning, in the description in a deed, *that* must govern, and the grant be confined within the boundaries given. And a place of beginning cannot be varied by the incidental mention of it in a subsequent patent. (*Jackson v. Wilkinson*, 17 *John*. 146. *Same v. Wendell*, 5 *Wend.* 142; *affirmed* 8 *id.* 183.)

What is most material and most certain in the description of the property granted, has a controlling influence. Thus, a river, a known stream, a spring, or even a marked tree, controls both course and distance. Courses and distance must be varied, and distance lengthened or shortened so as to conform to the natural or ascertained objects or bounds called for by the grant. (*Jackson v. Camp*, 1 *Cowen*, 605. *Doe v. Thompson*, 5 *id.* 371. *Jackson v. Frost*, *Id.* 346. *Same v. Ives*, 9 *id.* 661. *The People v. Wendell*, 8 *Wend.* 183, *affirming* *S. C.* 5 *id.* 142.)

Where the boundary is a highway or a river, unless there be some express words in the grant limiting the boundary to the bank of the river, or to the side of the highway, the center of the river or the highway is to be taken as the boundary. (*Jackson v. Hathaway*, 15 *John*. 447. *Jackson v. Louw*, 12 *id.* 252. *Same v. Halstead*, 5 *Cowen*, 216. *Ex parte Jennings*, 6 *id.* 518. *The People v. Seymour*, 6 *id.* 579. *Luce v. Carley*, 24 *Wend.* 451.)

In some cases the actual location of the premises on the ground, by the parties, and acquiescing therein for a long period of time, will conclude them; and estop them from showing that such location was erroneously made. Long acquiescence in even an errone-

ous location will authorize the jury to find that the plaintiff had agreed to a location different from his deed; and whether he knew his rights or not, such acquiescence or location will conclude him. (*Rockwell v. Adams*, 7 Cowen, 761. *McCormick v. Barnum*, 10 Wend. 104. *Dibble v. Rogers*, 13 id. 536.)

So where a location is made under a deed and survey, and an undisturbed possession is held accordingly for thirty-eight years, it was allowed to prevail, though the survey was incorrect. (*Jackson v. Deiffendorff*, 3 John. 269.) So a boundary according to which the parties had occupied for forty-one years, was not allowed to be disturbed. (*Jackson v. McCall*, 10 id. 377.) It is presumed that a much shorter possession, in analogy to the statute of limitations, which we have elsewhere considered, will be sufficient to conclude the parties. In *Jackson v. Widger*, 7 Cowen, 723,) an acquiescence of twenty years in the settling of a line by his surveyor, was held to conclude the plaintiff from disputing it.

Where the description of the boundaries are somewhat vague and indefinite, the acts of the parties, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. (*Jackson v. Wood*, 13 John. 346.)

The doctrine of a practical location of premises does not rest wholly on the principles of the statute of limitations. It is founded in justice and public policy. It is intended to quiet the actual possession of parties, and give peace to the honest occupants of their farms. The remarks of the chancellor in *Adams v. Rockwell*, and which appear to have been concurred in by the court of errors, are founded in wisdom and good sense. He says: "Where there can be no real doubt as to how the premises should be located, according to certain and known boundaries described in the deed, to establish a practical location different therefrom, which shall deprive the party, claiming under the deed, of his legal rights, there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry, under the statute of limitations, in relation to real estate; or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof; or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line, which would be an injury to him; and which he would not have done, if the line had not been so located; in which

case, perhaps, a grant might be presumed within twenty years." (See also *Van Wyck v. Wright*, 18 *Wend.* 157.)

The acquiescence, to be available against the party, must be by one *sui juris*, and not laboring under any disability. Thus, a feme covert is not bound by the acquiescence of her husband in an erroneous line, dividing lands owned by her from adjoining lands. (*Bradstreet v. Pratt*, 17 *Wend.* 44.) The same principle applies with greater force to lunatics, idiots and infants.

SECTION V.

By what Words different Estates are Created.

The rule, at common law was, that to create an estate in fee simple, the word "heirs" was absolutely indispensable. (*Littleton*, § 1. *Co. Litt.* 8 b.) Lord Coke says, that if land be conveyed to a man and his *heir*, in the singular number, he has only an estate for life. The doctrine that an estate in fee could not pass without words of inheritance was the former law of this state. (*Jackson v. Myers*, 3 *John.* 388. *Same v. Davenport*, 18 *id.* 295; *S. C. affirmed on error*, 20 *id.* 537.) But a conveyance to a corporation, whether sole or aggregate, did not require words of *inheritance* to pass a fee; but in a grant to a corporation *sole*, the word "successors," is necessary.

A different rule prevailed in devises of real estate. Any words indicating an intention to pass the fee would have that effect. The word heirs was not indispensable in the case of a will as it was in the case of a deed. (*Jackson v. Delany*, 11 *John.* 365; *affirmed* 13 *id.* 536. *Pond v. Bergh*, 10 *Paige*, 140.)

Such was the rule of law in this state until the revised statutes took effect in 1830. In determining the quantity of interest which passed by a deed executed previous to that time, the construction must be according to the former law: one rule applying in the case of deeds, and a more lax one in the case of a devise by will. The revisers, in order to remove this diversity, proposed to the legislature to abolish this distinction, and substantially to make the rule which governed in the case of devises, control also in the case of deeds. The legislature adopted the suggestion, and enacted that the term "*heirs*," or other words of inheritance, should not be requisite to create or convey an estate in fee; and further enacted, that every grant or devise of real estate, or any interest therein,

thereafter to be executed, should pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest, should appear by express terms, or be necessarily implied in the terms of such grant. (1 R. S. 748, § 1.)

In the construction of devises the courts had been in the habit of seeking for the intention, though apt words were not used. If enough appeared to show the object and design of the testator, his intention would be carried into effect, whereas in the case of deeds if the word "heirs" was omitted, a fee simple could not be made to pass, though the grantor conveyed all his estate to the grantee forever; so important were words of limitation in a deed. To place both modes of alienation upon the same footing, the legislature at the same time further enacted, that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it should be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent could be collected from the whole instrument and was consistent with the rules of law. (*Id.* § 2.) Thus, deeds and wills are now placed upon the same footing, with respect to words of limitation; or the quantity of estate intended to be conveyed or devised.

This new rule dispensing with the word heirs as essential to pass a fee, has been adopted in several other states. It is in truth the rule which prevails in all civil law countries, none of which it is believed insisted on any particular form of words as indispensable to the passing of the entire interest of the grantor. The grant to Alvarado, of a large domain in California, which the latter afterwards sold to Col. Fremont, was made according to the laws of Mexico, without any words of inheritance, and was still held by the supreme court of the United States to carry a fee, and to entitle him to a patent from the United States. (*Fremont v. The United States*, 17 How. 542, 545.)

But though the rule has been thus settled by legislative enactment since 1830, still few deeds, it is believed, are written without the words of limitation which were formerly inserted. As the word heirs is as expressive of the intent to pass a fee simple as any other, and probably more so, it is still recommended to all conveyancers to adhere, in this respect, to the ancient form. The blank deeds furnished by the stationers still contain those words when the design is to convey a fee.

An estate in fee simple will, in England, pass to the king without the words heirs or successors; partly, it is said, on account of his prerogative, and partly because in judgment of law the king never dies. (*Cruise's Dig. Deed, ch. 22, § 10.*) As the people in this state succeed to the prerogative of the king, it is presumed that a deed of all the grantor's estate to the people carries a fee or whatever other estate the grantee had, without words of limitation.

If it be the design of the grantor, who is the owner of the fee, to convey to another a life estate, the usual mode of expressing it is, "*to hold to the said grantee and his assigns, for and during the term of his natural life.*" If the intention be to grant it for the life of the grantor, or the life of a stranger by name, the phraseology must be changed so as to express that intention.

Estates for years are usually created in deeds by the words "*To hold to the said A. B., his executors, administrators and assigns, from the day of the date hereof for and during, and unto the full end and term of ——— year thence next ensuing and fully to be complete and ended.*" Any other words expressive of the intent will be equally effectual.

The technical words for creating an estate at will are "*To hold to the said A. B. at the will of the lessor.*" (*Litt. § 68.*)

With respect to joint estates, it was the rule at common law, that where land is granted to two or more persons, except husband and wife, to hold to them and their heirs, or for the term of their lives, or for the term of another's life, without any restrictive or explanatory words; all the persons to whom lands were so conveyed took as joint tenants. This was the rule in this state prior to the act of 1786. (1 *R. L.* 54, § 6.) That act as revised in 1830, (1 *R. S.* 727, § 44,) provides that in every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate vested in executors or trustees as such, shall be held by them in joint tenancy. This act as revised took effect retrospectively; for it is made to apply as well to estates already created or vested as to estates thereafter to be granted or devised. But neither this or any other statute affects the character of the estate granted or devised in fee to husband and wife, who now as formerly are neither properly joint tenants or tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout et non per my.*

The consequence of which is, that neither the husband or the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. (2 *Black. Com.* 182; and *ante*, page 180.)

At common law, the usual mode of creating a tenancy in common was to limit the estate to two or more persons, "*equally to be divided among them; they to take as tenants in common and not as joint tenants.*" Such a clause in a deed is now unnecessary to create a tenancy in common; for we have seen that by the statute, if the estate be granted or devised to two or more persons in their own right, without any words of explanation, they will take as tenants in common. These words, however, though unnecessary, will not vitiate, and are often inserted in wills, when a tenancy in common is intended to be created. If it be intended to create a joint tenancy in a grant or devise to persons in their own right, the usual mode is to limit the estate to two or more, "*to have and to hold the same, not in tenancy in common, but in joint tenancy.*"

If the grant or devise be to executors or trustees as such, the statute declares the nature of the estate, without special words of restriction or explanation. Nevertheless, the conveyancer or the framer of a devise, not unfrequently, for greater caution, inserts the words "*as joint tenants and not as tenants in common.*" These words, though unnecessary in such a case, will occasion no inconvenience.

In the case of marriage articles, the construction is founded on the apparent intent of the parties, however untechnically expressed; and it is, therefore, more liberal than in the case of deeds. (*Twisden v. Lock*, *Amb.* 663.)

In this state we have seen, in a former part of this treatise, that all estates tail are abolished; and that every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, 1782, shall hereafter be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute. (1 *R. S.* 722, § 3, *ante p.* 167.) The words by which that estate was formerly created were such as denoted the particular kind of heirs who were to succeed to the inheritance, as to *the heirs male of the grantee, or devisee; or the heirs female—or the heirs of the grantee lawfully begotten upon his present wife, and the like.* Similar words are sometimes found in wills drawn by persons not skilled in conveyancing, and it is scarcely

necessary to add, that instead of an estate tail, an estate in fee simple is thus created; and that the heirs generally, and not any particular heirs in exclusion of others, succeed to the inheritance.

The forms of conveyances in the Appendix will show the reader examples of the several kinds of estate, and of the covenants which are usually contained in them, to which reference may be made.

SECTION VI.

Of the Covenants in Deeds.

A covenant is an agreement or consent of two or more by deed in writing, sealed and delivered, whereby either one of the parties promises to the other that something is done already, or shall be done afterwards. He that makes the covenant is called the covenantor, and he to whom it is made, the covenantee. (*Touchstone*, 160.) In fewer words, it is defined by Stephens, in his commentaries, as a promise by deed. (2 *Steph. Com.* 108.)

No particular technical words are necessary to make a covenant; but any words which import an agreement between the parties to a deed, will suffice for that purpose. (*Hallet v. Wylie*, 3 *John.* 48. *Bull v. Follett*, 5 *Cowen*, 170.)

At common law, covenants were either *express* or *implied*. *Express* covenants were when the intention was indicated by the language of the instrument; *implied*, when they resulted from the nature of the conveyance. Thus, though the words grant, bargain, sell, alien and confirm, in a conveyance in fee, did not imply a covenant, the words "*dedi*," or "*I give*," did imply a warranty for the life of the grantor. (*Frost v. Raymond*, 2 *Caines*, 188. *Kent v. Welsh*, 7 *John.* 258.)

The revisers, in 1830, proposed to continue implied covenants, and to define by legislative enactments, the cases in which they should be implied, and the nature of the covenants that should be thus implied. This enactment they supposed would relieve the law from obscurity, and abrogate the principle which had been established, that an express covenant in a deed takes away all implied covenants. (*Vanderkan v. Vanderkan*, 11 *John.* 122.) But the legislature did not adopt that proposal, but coincided with the alternative suggestion of the revisers, and declared that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. (1 *R. S.* 738, § 140.) The

supreme court has said that the language is imperative, leaving no room for construction. It applies to all conveyances of real estate, whether they be grants in fee, for term of years, or by way of mortgage. (*Kinney v. Watts*, 14 *Wend.* 40. *Hone v. Fisher*, 2 *Barb. Ch.* 569.) The chancellor, in *Tone v. Brace*, (11 *Paige*, 569,) differs from the supreme court in *Kinney v. Watts*, (*supra*), and supposes that the 140th section of the revised statutes does not extend to *an estate for years*, and, therefore, that the old rule with respect to implied covenants remains as to chattel interests. The difference between the two courts has not yet been authoritatively settled. We have already had occasion to notice that the legislature also abolished, at the same time, lineal and collateral warranties, with all their incidents. As a substitute, they enacted suitable provisions for making the heirs and devisees of the covenantor answerable to the extent of the lands descended or devised to them, in case the personal assets of the ancestor proved to be insufficient for that purpose. (1 *R. S.* 739, § 141. 2 *id.* 109, § 53.) The lineal and collateral warranties thus abrogated, are not the covenant of warranty usually inserted in our deeds at this day, but had their origin in feudal principles, which have thus been succeeded by better remedies.

The covenants which are usually entered into by a vendor seised in fee, and who parts with all his estate to his vendee, are 1, that he is seised in fee; 2, that he has power to convey; 3, for quiet enjoyment by the purchaser, his heirs and assigns; 4, that the estate is free from incumbrances; 5, for further assurance; and lastly, that the vendor will forever warrant and defend. (2 *Sugd. Vendors*, 702.)

It is the duty of the attorney of the vendor to see that his client does not enter into unusual covenants, without fully understanding their nature and effect. If the purchaser consents to take a defective title, relying on the covenants of the vendor, this fact should be distinctly stated in the deed.

There are some covenants which run with the land, and some which do not, and are only obligatory upon the covenantor, and his representatives.

We shall first notice those which do not run with the land.

1. The covenant of seisin, if broken at all, must be so at the time of the conveyance. (*Greenby v. Wilcox*, 2 *John.* 1. *Hamilton v. Wilson*, 4 *id.* 72. *Abbott v. Allen*, 14 *id.* 248. *Bingham v. Wei-*

derwax, 1 *Comst.* 509.) If the grantor have a seisin in fact, though not in law, the covenant is kept; but if he has neither seisin in fact nor in law, the covenant is broken at once. (*Fowler v. Poling*, 2 *Barb.* 300.)

In an action of covenant by the vendee against the vendor, for the breach of this covenant, the measure of damages is the value of the land at the time of the sale, and not of the eviction. The defendant is liable to refund the purchase money, together with interest to be calculated from the time that the plaintiff loses the mesne profits; and the costs, including reasonable counsel fees, which the plaintiff sustained in the action wherein he was evicted; but not the costs of the suit for the mesne profits. (*Staats v. Ten Eyck*, 3 *Caines*, 111. *Pitcher v. Livingston*, 4 *John.* 1. *Bennet v. Jackson*, 13 *id.* 50.) In an action of this kind the true consideration may be shown, and also that the whole or some part of it remains unpaid, notwithstanding a different consideration is expressed in the deed, and the receipt of it is admitted in the conveyance. (*Bingham v. Weiderwax*, 1 *Comst.* 514.)

On recovery by the grantee for breach of the covenant of seisin, where he has been in the actual enjoyment of the land and taken the mesne profits, he is entitled to recover the consideration money and the interest thereon for six years only, and the costs. The reason of this is, that on a recovery by the rightful owner against him, he is only liable for the mesne profits for six years, and hence his right to interest should be limited to the same period. (*Caulkins v. Harris*, 3 *Caines*, 324, and case before cited.)

2. The covenant that the grantor has power to convey as well as that against incumbrances, is broken at the time of the conveyance, if broken at all; and therefore does not run with the land. (*Greenby v. Wilcox*, *supra.* *Hamilton v. Wilson*, *supra.* *Fowler v. Poling*, *supra.* *Dimmick v. Lockwood*, 10 *Wend.* 142. *Kelly v. The Dutch Church*, 2 *Hill*, 105. *Webb v. Alexander*, 7 *Wend.* 281. *Beddoe's Executors v. Wadsworth*, 21 *id.* 120.) A covenant real ceases to be such when broken, and no longer runs with the land. (*Per Cowen, J.* in 21 *Wend.* 123, *supra.*) Hence none of the covenants which are broken when made run with the land.

In an action upon a general covenant for quiet enjoyment, the plaintiff must aver and prove that the person by whom he was evicted had a lawful title to the property; and that he had such title before or at the time of the conveyance by the defendant. (*Kelly*

v. *The Dutch Church*, 2 Hill, 111, per Bronson, J.) It must be both a lawful and a superior title.

The covenant for quiet enjoyment goes to the possession and not to the title; and is broken only by a lawful entry and expulsion from, or some actual disturbance in the possession. (*Korts v. Carpenter*, 5 John. 120. *Whitbeck v. Cook*, 15 id. 483.) It is therefore like a covenant of warranty, which however defective the title may be, is not broken till the possession is disturbed. When the latter event transpires, with respect either to the covenant for quiet enjoyment or the covenant of warranty, an action lies to recover damages for the failure both of possession and title, according to the extent of such failure. (*Beddoe's Executors v. Wadsworth*, 21 Wend. 124. *Webb v. Alexander*, supra. *Kelly v. The Dutch Church of Schenectady*, supra.) And this action can be brought only by the party whose possession has been disturbed.

It is said by Cowen, J. in *Beddoe's Ex'rs. v. Wadsworth*, already cited, that there is a difference in more respects than one between our own and the English cases as to what shall constitute a breach of the covenants of title, so as to take away the assignable quality. He says it would seem that in England a simple failure of title, without eviction, would be a breach of the covenants of quiet enjoyment. The cases already cited show, that with us the doctrine is clearly otherwise. In England, too, the covenant of seisin is said to run with the land till actual damages are sustained by the breach. But the reason assigned for the decision is too refined to be sound.

The doctrine of the courts in this state is, that where the covenants are all broken at the time they were made, so as to give an immediate right of action to the covenantee, they do not run with the land, and consequently the right of action does not pass to the assignee of the covenantee. The covenant of seisin, and of good right to convey and against incumbrances, all stand upon the same footing, and are broken at the instant they are made, if they are broken at all. (*Mitchell v. Warner*, 5 Comst. 497, and the cases before cited.)

The grantee who has taken a covenant of seisin is not bound to wait until evicted before bringing his action for the breach of this covenant. If he suspects the title of his grantor to be defective, he may commence his action at once, subject however to be defeated if the grantor can show that he had title in himself at the time he conveyed and had good right to convey. (*Abbott v. Allen*, 14 John.

248.) The covenant of seisin extends only to a title existing in a third person, and which might defeat the estate granted. (*Fitch v. Baldwin*, 17 *John*. 161.) It is a breach of this covenant if the covenantor was not seised of the entire estate, but others were seised of an undivided portion. (*Sedgwick v. Hollenbeck*, 7 *John*. 376.) But it is no breach of it that the land conveyed contains a less number of acres than is described in the deed, nor that it was incumbered by mortgages or judgments, nor that a portion of it is subject to the easement of a public highway. (*Mann v. Pearson*, 2 *John*. 37. *Stannard v. Eldridge*, 16 *id.* 254. *Whitbeck v. Cook*, 15 *id.* 483.) In these respects the purchaser should protect himself by other and appropriate covenants.

The covenant that the covenantor has good right to convey is said to be synonymous with the covenant of seisin. Of course the principles and practice applicable to the one, apply to the other also. (*Rickert v. Snyder*, 9 *Wend.* 421.)

So also with respect to the covenant against incumbrances, the grantee may extinguish them himself and then maintain an action against the covenantor for the actual damages; but where the incumbrance is still outstanding, and the grantee has suffered no disturbance by reason of it, he can only recover nominal damages.

2. With respect to covenants running with the land, it may be said that they embrace all such as extend to the possession as well as the title. This attribute belongs to the covenant of warranty, and the covenant for quiet enjoyment. (*Rickert v. Snyder*, *supra.*) A covenant to renew the lease at the end of the term, a covenant not to erect or suffer to be erected any tenement, edifice or structure, upon a street or common owned by the grantor in front of the premises, and a covenant by the lessor to repair in case of damage by fire, all run with the land, and in the latter case the covenant binds the grantee of the reversion to rebuild in case of a total destruction of the premises. (*Piggot v. Mason*, 1 *Paige*, 412. *Rutgers v. Hunter*, 6 *John. Ch.* 215. *The Trustees of Watertown v. Cowen*, 4 *Paige*, 510. *Allen v. Culver*, 3 *Denio*, 284.)

In delivering the judgment of the supreme court in *Allen v. Culver*, (*supra.*) Jewett, J. at page 295, discusses at large the subject of covenants which run with the land, and gives the following as instances of that class of covenants, embracing some which we have already mentioned, and others not yet specified, viz: 1. A covenant of warranty. (*Suydam v. Jones*, 10 *Wend.* 180. *Withy v. Mum-*

ford, 5 *Cowen*, 137. *Le Ray De-Chaumont v. Forsythe*, 2 *Penn. Rep.* 507. *Wyman v. Ballard*, 12 *Mass. Rep.* 306. *Mitchell v. Warner*, 5 *Conn. Rep.* 497.) 2. A covenant for quiet enjoyment. (*Markland v. Crump*, 1 *Dev. & Bat.* 94.) 3. A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed. (*Fairbanks v. Williamson*, 7 *Greenl.* 96.) 4. A covenant by a tenant to repair. (*Demarest v. Willard*, 8 *Cowen*, 206. *Norman v. Wells*, 17 *Wend.* 148.) 5. A covenant to pay rent. 6. A covenant not to erect a building in a common or public square owned by the grantor in front of the premises conveyed. (*Watertown v. Cowen*, 4 *Paige*, 510.) It is no objection that the rent is a rent charge, or reserved in a grant in fee, with a clause of distress for non-payment. It still runs with the land, and payment may be enforced against the party occupying the land, or the land itself, as we have already had occasion to show under a former head. (*Van Rensselaer v. Hays*, 19 *N. Y. Rep.* 80. 2 *Sug. on Vendors*, *Perk. ed.* 177. *Ante*, p. 205.) It is a general rule that all covenants concerning title run with the land, except such as are broken before the land passes. (4 *Kent's Com.* 473.) Hence a covenant for further assurance runs with the land, whether the estate to which it relates be an estate in fee or for a term of years. (*Campbell v. Lewis*, 3 *Barn. & Ald.* 392. *Spencer v. Noyes*, 4 *Ves.* 370.)

The leading authority on the subject of covenants running with the land is *Spencer's case*, (5 *Co.* 16,) and see the note to that case. The authorities which have been cited are little more than a commentary upon it.

A covenant running with the land has relation to the land. If the thing to be done be merely *collateral to the land*, and does not touch or concern the thing demised in any sort, then the assignee is not charged. This was the effect of the 2d resolution of *Spencer's case*, (*supra*. *Dolph v. White*, 2 *Kern.* 301.)

There are cases where the covenant runs with the land, which do not arise under the statute. (1 *R. S.* 747, § 23.) That section, as modified by the laws of 1846, ch. 274, provides that the grantees of any demised land, tenements, rents or other hereditaments, or of the reversion thereof, the assignee of the lessor of any demise and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any

waste or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor. The subsequent section gives to the lessees of any lands, their assigns or personal representatives, the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances or relating to the title or possession of the premises demised. But independently of these provisions, the supreme court held, in *Norman v. Wells*, (*supra*,) that a covenant of the lessor of a mill with the lessee and his assigns, not to establish a rival mill on the same stream, runs with the land.

With regard to the covenant for further assurance, it is the duty of the covenantee, when he deems a further assurance necessary to devise the same, and give notice to the covenantor, or the person bound to fulfill the covenant. This assurance must be *reasonably* devised, and not differ from the nature and purport of the original bargain. The party to whom this notice is given is entitled to a reasonable time to consider of it; and he is, therefore, not in default and liable to an action, until, after reasonable notice, he neglects or refuses to give such further assurance. (*Miller v. Parson*, 9 *John*. 336.)

The question has sometimes arisen as to the person competent to maintain an action for a breach of a covenant which runs with the land. In *Kane v. Sanger*, (14 *John*. 89, 93,) Spencer, J. intimated that where covenants run with the land, if the land is assigned or conveyed, before the covenants are broken, and afterwards they are broken, the assignee or grantee can alone bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the assignee or grantee against such breach of covenants, then the assignor or grantor must bring the action. But this dictum of the learned judge was shown, by Savage, Ch. J. in *Withy v. Mumford*, (*supra*, p. 140,) to have been unnecessary to a decision of the case before him, and unsupported by authority, and contrary to the general principles applicable to such cases. The doctrine is now well supported that an assignee with warranty, or without warranty, can maintain an action for a breach of the covenant which has happened after the assignment. (*See also Garlock v. Closs*, 5 *Cowen*, 143, note. · *Beddoe v. Wadsworth*, 21 *Wend*.)

120.) In the last mentioned case, it was held that the covenants may be assigned as well by a release and quit-claim deed, as by deed of bargain and sale, or by lease and release. Even though the grantor had no title at the time of the conveyance, if possession be taken under the deed by the grantee, and there is a subsequent eviction by title paramount, the grantor, under a quit-claim deed from the original grantor, can maintain an action for the breach of the covenant of warranty, and for quiet enjoyment. (*Id.*) The cases before cited show that in such a case an action could not be maintained for breach of the *covenant of seisin*, because that was broken at the time it was made, and a cause of action existed in the original covenantor from that moment. But with regard to the other covenants, those of warranty and quiet enjoyment, no cause of action existed until the eviction had taken place.

In cases where the covenant passes to the assignee with the land, it cannot be affected by the equities existing between the original parties, any more than the legal title to the land itself. A covenant under seal cannot be discharged by a parol agreement before breach. (*Kay v. Waghorn*, 1 *Taunt.* 427.) The discharge must be by matter of as high a nature as that which creates the debt or duty. (*Preston v. Christmas*, 2 *Wil.* 86. *Worrall v. Munn*, 1 *Seld.* 239, *per Paige, J.*) This is universally true where the action is founded upon, or grows exclusively out of the deed or covenant. (*Blake's case*, 6 *Co.* 43.) Hence, in *Suydam v. Jones*, (10 *Wend.* 180,) before cited, where premises were conveyed subject to a mortgage, and it was agreed at the time of the conveyance, by parol, that the grantee should assume the payment of the mortgage and pay the grantor only the difference between the amount thereof and the sum agreed on as the consideration of the conveyance, and that the covenants of warranty and for quiet enjoyment should not be considered to extend to the mortgage, it was held that such agreement could not be set up in bar to an action brought by the assignee of the covenantee who was evicted under the mortgage. Such a defense at law, it will be seen, would be attempting to show by parol that the real contract was different from that expressed in the deed, and that a covenant under seal, can, *before breach*, be discharged by a parol agreement; neither of which can be done in a court of law.

The doctrine of this and the other cases shows the importance of expressing the whole contract fully and according to the intention

of the parties, in the instrument itself, and not leave any thing to the vague recollection of witnesses.

In assigning the breaches on these covenants, the pleader must be governed by the nature of the covenant. It belongs to a treatise on pleading, rather than to our principal subject, to suggest the various questions which will arise in asserting the remedy. All the covenantees must sue, although they did not all sign and seal the agreement. (*Smith v. Kerr*, 3 *Comst.* 144.) If one of two or more covenantors die, the action must be brought against the survivor. (*Gere v. Clark*, 6 *Hill*, 350.)

CHAPTER VI.

OF THE SEVERAL KINDS OF DEEDS KNOWN TO THE LAW.

Although in this state the mode of conveyance by fine and recovery, and by feoffment, has been abolished, and a strong inclination has been manifested to substitute the grant for most of the others, it is still deemed necessary to know what were the conveyances at the common law, and what derived their origin from the statute of uses.

According to the elementary writers, the original conveyances deriving their effect from the common law, were 1. Feoffment. 2. Gift. 3. Grant. 4. Lease. 5. Exchange. 6. Partition. These were called original conveyances. The following were denominated derivative conveyances. 1. Release. 2. Confirmation. 3. Surrender. 4. Assignment. 5. Defeasance. Those conveyances which owed their origin to the statute of uses were 1. Covenant to stand seised to uses. 2. Bargain and sale. 3. Lease and release. 4. Deed to lead or declare the uses of other more direct conveyances; and 5. Deeds of revocation of uses.

Though some of these modes of conveyance have become obsolete even in England, and others have been expressly abolished in this state, it will still be deemed expedient to have some general knowledge of them all. We shall proceed therefore to notice briefly some of the points by which they were characterized.

SECTION I.

Of Feoffment, Gift and Grant.

The office of the feoffment was to convey a free inheritance to a man and his heirs. The usual operative words were, "*give, grant and enfeoff,*" but any other words of equal import would be sufficient. The mere signing and sealing of the feoffment were in no case sufficient to transfer an estate of freehold, unless possession was formally delivered by the feoffor to the feoffee. This was called livery of seisin, without which a deed of feoffment only passed an estate at will. There were, according to Coke, two kinds of livery: 1. A livery in *deed*; as when the feoffor takes the ring of the door, or turf or twig of the land, and delivers the same upon the land, to the feoffee in the name of seisin of the land. 2. Livery in law, was when the feoffor said to the feoffee, being in view of the house or land, I give you yonder land, to you and your heirs, and, go enter into the same and take possession thereof accordingly, and the feoffee accordingly, in the lifetime of the feoffor, enters; this is a good feoffment. (*Co. Litt.* 48 *a*, and 48 *b*.)

The operation of a feoffment was stronger than any other conveyance. It cleared away all diversions, abatements, intrusions and other wrongful or defeasible estates. It operated on the possession, without regard to the estate or interest of the feoffor; so that to make a feoffment good and valid, nothing was wanting but possession.

No person could make a valid *livery in deed* unless he had the actual possession at the moment of such livery; and a livery in law was not effectual to transfer the freehold, until an actual entry was made by the feoffee, in the lifetime of the feoffor and feoffee. But it is unnecessary to enlarge upon the doctrine and the refinements which grew up under this mode of conveyance. It is sufficient to say that it now has no existence in this state, and has been expressly abolished. (1 *R. S.* 738, § 136.)

A *gift*, as a mode of conveyance, at common law, was properly applied to the creation of an estate tail. It differed in nothing from the feoffment but in the nature of the estate that passed by it. Livery of seisin must be given to the donee to render it effectual. The gift had the same relation to an estate in fee tail, as the feoff-

ment had to an estate in fee simple. The converting of estates in fee tail into estates in fee simple, necessarily dispensed with this mode of conveyance. Like the feoffment, therefore, it is now no longer one of the modes of conveyance in this state.

A *grant*, at common law, was properly applicable to the transfer of incorporeal hereditaments. The operative words were, *dedi et concessi, given and granted*. It required no livery of seisin. None, indeed, could be given of an incorporeal hereditament.

The operation of a grant by which any thing already in existence is conveyed, was materially different from that of a feoffment; for a feoffment, it has been seen, operated immediately on the possession without any regard to the estate or interest of the feoffor; whereas a grant only operated on the estate or interest of the grantor, and would pass no more than what he was by law enabled to convey. (*Co. Litt. 251 a.*)

This principle has been adopted by the revised statutes, which expressly enact that no greater estate or interest shall be construed to pass by any grant or conveyance thereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant shall be conclusive as against the grantor and his heirs claiming from him by descent, and as against subsequent purchasers from such grantor, or from his heirs claiming as such, except a subsequent purchaser in good faith for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded. (1 *R. S.* 739, §§ 143, 144.)

It was at common law, one of the consequences of the above doctrine with respect to grants, that they never worked a forfeiture; so that if tenant for life or years granted the estate in fee, it was no forfeiture, because nothing passed but that which lawfully might pass. (*Co. Litt. 254 b.*) This principle, too, is adopted by the revised statutes, and applied to any conveyance made by a tenant for life or years, of a greater estate than he possessed, or could lawfully convey. Such conveyance, it is enacted, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate or interest which such tenant could lawfully convey. (1 *R. S.* 739, § 145.)

Formerly, as a grant did not require the notoriety of a livery of seisin to make it effectual, it was supposed to be necessary that it should be accompanied with the attornment of the tenant, that is,

the consent of the tenant to the transfer. The necessity of an attornment is now taken away in England by statute 4 and 5 Anne, ch. 16, which was adopted in this state at an early day. (1 *R. L.* 525, § 25. 1 *R. S.* 739, § 146.) But the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and the tenant is not liable to such grantee for any breach of the condition of the demise, until he shall have had notice of the grant. (*Id.*) This notice is a substitute for the ancient attornment, and should always be given by the grantee of the landlord to the tenant, in order that the latter may know to whom the payment of his rent is due. Although there be no attornment of the tenant in form, or notice in writing of the assignment given, still the assignee of a lease, who has been recognized as such by the tenant, may sue in his own name for the rent, notwithstanding he has no interest in the reversion. The assignee of the rent alone, without the reversion, may recover in his own name. (*Allen v. Bryan*, 5 *Barn. & Cress.* 512. *Demarest v. Willard*, 8 *Cowen*, 206. *Willard v. Tilghman*, 2 *Hill*, 277.) This was on the ground formerly, that after attornment by the tenant, the privity of contract was transferred to the assignee of the rent. Attornment is now unnecessary, but notice is required for certain purposes; and the consent of the tenant to the transfer is conclusively shown by his paying rent to the assignee of the lessors. Such payment dispenses with evidence of notice. (*Moffat v. Smith*, 4 *Comst.* 126.)

As a grant only operates on the estate of the grantor, and passes only such interest as he possessed at the time of the delivery of the grant, if the statute was silent on the subject the grant would not be void if the grantor was out of possession at the time. But the statute has interposed and enacted that every grant of lands shall be void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. (1 *R. S.* 739, § 147. *Webb v. Bindon*, 21 *Wend.* 98. *Poor v. Horton*, 15 *Barb.* 485. *Vrooman v. Shepherd*, 14 *id.* 441.)

We have seen in the previous chapter, that the legislature have adopted the grant as the conveyance of the fee, or of a freehold estate. A grant is a deed; and the circumstances essential to its validity have already been detailed. A legal grant effectual to pass a fee simple, or any less estate, may be created by few words. It is usual, however, to add the forms of conveyance to which the

public have long been familiar, and to insert such covenants for title as are agreed to by the parties. These covenants are not necessary to pass the title. A conveyance or assurance is good, without a warranty, or personal covenant. (*Nixon v. Hyserott*, 5 *John*. 58.)

The statute, it has been seen, permits deeds of bargain and sale, and lease and release still to be used, and declares that they shall be deemed grants. (1 *R. S.* 739, § 142.) The law does not insist upon any particular form of words to constitute a grant. Of course whatever will constitute a deed of bargain and sale will constitute a grant. A deed merely *remising, releasing and forever quit-claiming* to the grantee and his heirs and assigns forever, has been held to be a good conveyance by way of bargain and sale before the revised statutes, and is therefore now a good *grant* under the statute. (*Jackson v. Fish*, 10 *John*. 456. *Beddow's Ex'rs v. Wadsworth*, 21 *Wend.* 120.)

But while the law is thus indulgent in carrying out the intention of the parties, it is nevertheless desirable that well considered forms of conveyance should be adopted. Such forms are the parent of security and peace, while those which deviate from established usage invite litigation. In compiling the forms in the Appendix, we have sought rather for such as have received the sanction of time, than to amuse the reader by untried novelties.

SECTION II.

Of Lease.

The appropriate definition of a lease is, that it is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent, or other income, on the other. It is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of a return of rent, or other recompense. It is always for a less time than the lessor has in the premises. If it be for the whole interest of the lessor, it is more properly an assignment, or in the language of our statutes, a grant. (2 *Black. Com.* 217.)

The proper words for creating a lease are, "*demise, lease and to farm let.*" But any other words which show the intention of the parties are sufficient. And we have seen in the preceding chapter, that the whole instrument must be examined to ascertain the intent. A memorandum for a lease between H. & W. by which H.

agreed to let or lease to W. (the defendant) for the term of four years, from &c. for a certain rent, payable &c., and the said W. agrees to take the said premises on the said terms and conditions, was held to be a lease, and not merely an agreement for a lease. (*Hallett v. Wylie*, 3 John. 44.)

So where A. by articles of agreement covenanted to let and hire to B. a certain farm for the term of six years, from the 1st of April, 1807, to the 1st of April, 1813, on condition, and in consideration, that B. should pay A. two hundred and fifty dollars on the first day of April in each and every year during the term; this was held to be a lease *in presenti*, to commence on the 2d April, 1807, which was the evident intention of the parties; for if the term was to be construed to commence on the 1st of April, 1807, the lessee would have to pay seven years' rent instead of six; and in case of B.'s being kept out of possession of the premises, his remedy would be ejectment, under the law then in being, and not an action for a breach of covenant. (*Thornton v. Payne*, 5 John. 74.)

In the last mentioned case, the preposition "*from*" excludes the day mentioned, as it did also in *Wilcox v. Wood*, (9 Wend. 346.) In some cases it includes the day referred to; and in all these cases the intention controls, where it can be gathered from other parts of the instrument. The better way is, in all conveyances, to insert the word *inclusive* or *exclusive*, after the mention of the day, according as the parties wish to have it construed. This will often obviate a controversy.

But letting land upon shares is not, technically speaking, a *lease*; and the parties are merely tenants in common of the crop. (*Caswell v. Districh*, 15 Wend. 379. *Bradish v. Schenck*, 8 John. 151.) So a person entering under a contract for a deed, is not a tenant; nor entitled to notice to quit, nor liable to distress, while that remedy remained, or assumpsit for the rent. On the non-performance of his contract he was liable to be turned out as a trespasser, and was, in that character, liable for the mesne profits. (*Smith v. Stewart*, 6 John. 46.)

An agreement by A. and B., the latter to work for A., on his farm, a year, for so much, and to be supplied with a house, is not a lease, but creates the relation of master and servant. (*Haywood v. Miller*, 3 Hill, 90.) So a contract for rooms and board made with the keeper of a hotel, or boarding house keeper, does not cre-

ate the relation of landlord and tenant. (*Wilson v. Martin*, 1 *Denio*, 602.)

A lease to A., his executors, administrators and assigns, forever, was, before the revised statutes, held to be only a lease for life. (*Williams v. Woodard*, 2 *Wend.* 487.) If the lessor was, at the time, the owner of the fee, it is believed, that under the provisions of the revised statutes, the word *forever* would carry the fee, notwithstanding the word *heirs* was not inserted as a word of limitation, unless, indeed, other parts of the instrument would indicate that only a life estate was intended to be conveyed. (1 *R. S.* 748, §§ 1 and 2.)

Although the proper definition of a lease embraces only such instruments of conveyance as transfer to the lessee a less estate than is possessed by the lessor, thus leaving a reversion in him, yet we have seen, in a preceding chapter, that grants in fee, reserving an annual rent, with clause of distress, create a valid rent charge, notwithstanding there is no reversion in the person entitled to it; and that the covenant to pay such rent runs with the land, as well as the condition of re-entry for its non-payment. (*See ante*, p. 82 &c. *Van Rensselaer v. Hays*, 5 *Smith*, 68–80. 2 *Sug.* 725, *Perkins' ed. top paging* 177.) This species of conveyance is most generally called a lease in fee, or durable lease, and is thus often denominated in the adjudged cases and in the statutes. (*Jackson v. Allen*, 3 *Cowen*, 220. *L. of* 1805, ch. 98, p. 254. 1 *R. L.* 364, § 3. 1 *R. S.* 748, § 25.) The law of 1860, ch. 396, enacting that the act of 1805, and its subsequent re-enactments, shall not apply to deeds of conveyance in fee made before the 9th April, 1805, nor to such deeds thereafter to be made, does not impair the common law rule on this subject, nor affect the usage that has prevailed in this state from an early period. Nor does it alter the name by which that species of conveyance is commonly called.

With regard to the *form* of the instrument demising premises from one person to another, it is usually an indenture, executed under the hand and seal of the respective parties, both parts of which, in such a case, are deemed originals. (*Lewis v. Payn*, 8 *Cowen*, 71.) A lease for more than one year, is required by the statute of frauds, to be by deed or conveyance in writing, subscribed by the party creating it. The same principle applies to the crea-

tion of estates or interests in land, and to the granting, assigning, surrendering or declaring the same, except by operation of law, or by last will and testament. (2 R. S. 134, § 6.)

An oral lease for more than one year, though void by the statute of frauds for the whole term, is good for one year if the lessee enters, and creates an estate from year to year thereafter. (*The People v. Rickert*, 8 Cowen, 226. *Schuyler v. Leggett*, 2 id. 660.)

With regard to the *parties* competent to make a lease it may, in general, be said that all persons, natural or artificial, who are capable of being parties to a deed, and of which we have sufficiently treated in preceding chapters, may make and accept a lease. There are also some persons who are not authorized to convey land in fee, without the order or authority of some tribunal, who may nevertheless demise the premises of which they have the control for some limited time, less than a fee. This is the case with religious incorporations under the general laws; with committees of lunatics and habitual drunkards; with guardians, whether testamentary or appointed. But this branch of the subject will be treated in a subsequent chapter. (*See post*, ch. 7.)

It belongs more properly to a treatise on the law of landlord and tenant, to notice the various questions which may arise under leases. The limits of this work restrict us to a few only of the points which should be particularly regarded.

1. In respect to the covenants which may be, or are usually inserted in leases, we have already, in the preceding chapter, brought to the notice of the reader such of them as are usually inserted in deeds, and discriminated between such as run with the land and such as are in gross, or are obligatory only on the covenantor or his representatives. Some of those covenants are applicable to leases. Without repeating these, but referring the reader to the chapter in which the subject is discussed, we propose now to treat of some of the covenants usually inserted in leases, with the conditions, exceptions and reservations therein contained.

Covenants are of two kinds, *express* and *implied*. We defined the difference between them in a preceding chapter, and adverted to the difference in opinion between the late supreme court and the late chancellor, on the question whether the statute which directs that no covenant shall be implied in any conveyance of real estate extended to a conveyance of a chattel interest or not. (*See page 411.*) Without undertaking to settle this question, it is proper

to advert to a few such cases as have arisen and been decided on the subject of implied covenants.

It has been held by the supreme court that there is no *implied* covenant or warranty on the part of the lessor of a dwelling house that the premises are tenantable. (*Cleves v. Willoughby*, 7 Hill, 83.) The learned judge who delivered the opinion in this case took a distinction between a lease of a house for years and a demise of ready furnished lodgings. With respect to the *quality* or *condition* of property, he said that the maxim of *caveat emptor* applied; and that, therefore, the purchaser took the risk of its quality and condition unless he protected himself by an express agreement on the subject. He mentioned as the only exception to that rule the sale of provisions for domestic use; (*Van Vranklin v. Fonda*, 12 John. 468;) and a demise of ready furnished lodgings. (*Smith v. Mar-rable*, 1 C. & Mas. 479.) To these he said the law implied a warranty that the former are wholesome, and the latter free from nuisance.

There is no *implied* covenant in a demise for years that the landlord shall repair. The tenant, when there are no covenants on the subject, takes the premises for better or worse, and cannot involve his landlord in expense for repairs without his consent. If through default of repairs a municipal penalty is incurred, it falls upon the tenant. (*Mumford v. Brown*, 6 Cowen, 475. *The Mayor &c. v. Corliss*, 2 Sandf. 301.)

The fact that none, or very few covenants, are ever implied in a lease, renders it expedient that the parties should provide, by express covenant, for such contingencies as may reasonably be anticipated. These express covenants are extremely numerous. The first and most important is that for the payment of rent. The words yielding and paying, &c. constitute a covenant for the payment of rent, (*De Lancy v. Ganong*, 5 Seld. 9,) and this covenant runs with the land, whether the lease be for years or in fee; and if it be inserted in a lease, and be not qualified by any exception or condition, it formerly bound the tenant to pay rent during the continuance of the term, notwithstanding the premises were destroyed by fire, after the commencement of the tenancy. (*Hallett v. Wyllie*, 3 John. 44.) This was the well settled doctrine of the common law. (3 Burr. 1638, *per Lord Mansfield*. *Doe v. Sandham*, 1 T. R. 705.) This doctrine led to the insertion of covenants in leases, as to the party who should be required to repair in such cases, and to exceptions

or conditions qualifying the covenant to pay rent, and making suitable provision for this contingency. The legislature, by the act of April 13, 1860, ch. 345, provided for some of the cases which may arise. By that statute it is enacted, that the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant. And the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied. This is merely making provision by general law for a contingency which could be sufficiently guarded against by proper stipulations in the lease. In well considered leases of buildings there is usually a covenant on the part of the lessor, that in case the premises shall be partially damaged by fire, the same shall be repaired as speedily as possible, at the expense of the landlord; that in case the damage shall be so extensive as to render the premises untenable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth the lease shall, at the option of the tenant, cease and come to an end. [See the forms in the Appendix.]

The covenants for rebuilding and repairing run with the land, and are obligatory not only upon the lessor but upon his assigns. Of course the landlord, whoever he may be, is bound by it. In *Allen v. Culver*, (*supra*,) the lease contained a covenant that in case of damage to the buildings on the demised premises by fire rendering the same untenable, the lessor would repair. It was held that the grantee of the reversion was bound to rebuild houses which were wholly destroyed by fire. In that case, too, the lease embraced premises on which there were several buildings, and it contained in addition to the covenant last mentioned, a provision that the rent should cease for such part of the buildings as should be rendered untenable on account of injury by fire, while they should remain untenable, and a part of the buildings were destroyed by fire, and the landlord neglected to rebuild; it was held that the covenants to pay rent and to repair were independent, and that the lessee was bound to pay a proportionate part of the rent on account

of the buildings left uninjured, notwithstanding the default in rebuilding. The act of 1860, had it been in force at the time the case of *Allen v. Culver* arose, would not have aided the tenant; for the statute extends only to cases where the whole premises are destroyed, and does not seem to contemplate a case of a destruction of one out of several buildings included in the same lease, when the others are left uninjured, and the lease provides for a stoppage of the rent only as to those which are destroyed.

The covenant to keep the buildings in repair is usually inserted in such form as to bind the lessee and his assigns to that duty. And the latter is frequently bound by covenant to yield up the premises at the end of the term in good repair. If the covenant be that the tenant shall keep the premises in repair during the term, and at the expiration thereof yield them up in like condition, and the tenant permits them to go to decay, and omits to make necessary repairs, the lessor or his assigns may bring an action forthwith, and is not bound to wait until the expiration of the term. If the covenant was merely to *leave* the premises in good repair, probably no action could be maintained till the expiration of the term. (*Schiefelin v. Carpenter*, 15 *Wend.* 400.)

Sometimes the lessor binds himself and his heirs to pay to the tenant, at the end of the term, on his surrendering the same in good condition, for such buildings as he shall have erected on the same premises, or for such as may remain thereon at that time. Such a covenant does not bind the landlord to pay for ordinary repairs, but only for buildings erected by the tenant. This covenant runs with the land, and enures to the benefit of the assignee of the lessee, and enables the latter, at the end of the term, to recover for erections made by a previous tenant. (*Lametti v. Anderson*, 6 *Cowen*, 302. *Van Rensselaer v. Penniman*, 6 *Wend.* 569.)

When the lessee covenants to surrender up the possession of the premises at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but there is no covenant to repair or rebuild; and the buildings are destroyed by fire, the tenant is not bound to put up new buildings in the place of those destroyed. If there be, in such a case, any fixtures attached to, and forming a part of, the demised premises; and they become recovered by the fire, they do not thus lose their identity; but are the property of the landlord, and the tenant is liable

to an action if he carries them away. (*Warner v. Hitchens*, 5 Barb. 666.)

In some cases the lessor and lessee agree for a valuation of the improvements at the end of the term, by persons to be nominated by them. Both parties must concur in the appointment of the appraisers to make it obligatory; and if the lessor refuses to join in the appointment, the lessee alone cannot appoint them, and his only remedy is by action to recover their value, which in such case must be estimated by the jury. (*Holliday v. Marshall*, 7 John. 211.)

A covenant to renew the lease at the end of the term is a covenant, we have seen, that runs with the land; but it does not require that the renewed lease should contain a similar covenant. (*Piggot v. Mason*, 1 Paige, 412.) A covenant to renew a lease implies the same term and the same rent, but it does not necessarily imply that the renewed lease should contain the same covenants as in the original lease. The covenants are not indispensable to a lease. And hence, when parties stipulate for a renewal of the lease, they should specify in their covenant not only the duration of the term and the amount of rent, but also what covenants should be contained in the renewed lease. (*Rutgers v. Hunter*, 6 John. Ch. 218.)

The payment of taxes and other assessments should, in general, be provided for in the lease. This burden is usually assumed by the tenant, and it is, therefore, taken into consideration in fixing the amount of the rent. Sometimes the lessor himself assumes that burden; but in either case, the lease itself should contain the agreement of the parties on the subject. The lessee's covenant to pay assessments runs with the land, and binds the assignee of the term. If the covenant was on the part of the lessor, the same consequences follow. A covenant to pay all assessments for which the premises shall be liable, includes an assessment imposed for opening a street, although it was not authorized by any law existing at the time of the demise. (*Post v. Kearny*, 2 Comst. 394. *Oswald v. Gilfert*, 11 John. 443. *Corporation of N. Y. v. Cushman*, 10 id. 96. *Bleeker v. Ballou*, 3 Wend. 263.)

The usual covenant for quiet enjoyment should be inserted; at least until it is settled that such covenant can be implied in a lease for years, notwithstanding the statute abolishing implied covenants. (*See Kinney v. Watts*, *supra*, and *Tone v. Brace*, *supra*.)

A covenant on the part of the lessee not to assign or underlet the

whole or any part of the demised premises during the term or any part thereof, without the consent in writing of the lessor or his assigns, is frequently inserted in leases. If the lease be by its terms assignable only with the consent of the lessor, an assignment of a part of the premises with the consent of the landlord is not a surrender; and the lessee remains liable for any act of the assignee which amounts to a breach of any of the covenants in the lease. (*Jackson v. Brownson*, 7 John. 227.)

To constitute an assignee of the lease, the assignment must be of the *whole term and estate*, though it may be of but part of the premises. (*Van Rensselaer v. Gallup*, 5 Denio, 454.) One who takes a conveyance of the whole term in any part of the premises, or in an undivided part of any portion of the premises, is an assignee, and liable to a portion of the rent. (*Childs v. Clark*, 3 Barb. Ch. 52.) The purchaser under a mortgage of all the estate of a lessee, is an assignee. (*Kearney v. Post*, 1 Sandf. 105.)

The covenants in a lease are sometimes protected by a condition, avoiding the estate and working a forfeiture in case of a breach by the tenant. The breach of such condition makes the estate voidable at the election of the lessor or his assigns. The condition of forfeiture may be inserted for the non-payment of rent, or for any other default, or improper conduct of the tenant. And an estate becomes forfeited by breach of a condition subsequent by a grantee, though the grantee be an infant or feme covert. (*Norman v. Wells*, 17 Wend. 136. *Clark v. Jones*, 1 Den. 516. *Garret v. Scouter*, 3 id. 334.)

Covenants and conditions in restraint of alienation could at common law only be imposed by persons having at least a *reversion*, or *possibility of reversion*, therein. A reservation in a conveyance in fee, of a pre-emptive right of purchase by the grantor or his heirs, &c., and the reservation by the grantor of a right to a portion of the sale money on each sale by the grantee, &c., are void as repugnant to the estate granted, and as illegal restraints upon the power of alienation. These principles apply as well to leases in fee, reserving rent, as to absolute conveyances. (*DePeyster v. Michael*, 2 Seld. 467.) But the right of re-entry for non-payment of rent may be reserved upon a conveyance in fee. (*Van Rensselaer v. Ball*, 5 Smith, 100. *Same v. Hays*, Id. 68.)

There are various other covenants and conditions inserted in leases, according to the agreements of the parties. Enough has

been said on this branch of the subject to awaken the attention of the reader to the subject. The precedents in the Appendix will exhibit other covenants, and the circumstances and condition of parties will perhaps render others expedient or necessary.

With regard to the duration of the estate created by lease, we have no restriction save that contained in the 14th section of the 1st article of the constitution of 1846, which provides that no lease or grant of *agricultural land* for a longer period than twelve years thereafter made, in which shall be reserved any rent or service of any kind, shall be valid. This restriction is not applicable to urban or village leases, or to any others except those intended for agricultural purposes. The constitution of 1846 was framed during the period when the anti-rent excitement, which prevailed for many years in certain portions of the state, was fresh in the recollection of the delegates; and the object doubtless was to prevent the formation of long leases for agricultural purposes, and to encourage the tenants in their efforts to acquire the fee. Beyond this restriction, there is no legal objection that will prevent the owner of land in fee from granting any lease at will, or for years, or for life, or for any other period that may suit the convenience of the parties.

A tenant by the curtesy or in dower, or other tenant for life, can make no lease that will be valid after the death of the lessor. The derivative estate must fall with that out of which it was created.

A tenant for years may assign his whole term, or he may make a lease to a third person of a less estate than his own.

The act of 1855, chapter 230, in relation to conveyances and devises of personal and real estate for religious purposes, forbids the making of any grant, conveyance, devise or lease, to any person and his successor or successors in any ecclesiastical office. The object of the statute evidently was to induce all the religious denominations to cause themselves to be incorporated under the general act, and the amendments thereto, so that the temporalities of the church might be under the control of the people, and not be subject exclusively to ecclesiastical management. Though the law is general, it affected only the Roman Catholics, who preferred to retain the title of the property, which was dedicated to religious purposes, in the hands of their bishop. This was believed to be contrary to the policy of our laws.

Guardian in socage had, at the common law, the custody of the

land, and was entitled to the profits for the benefit of the heirs. He might lease the land, avow and bring trespass in his own name. (*Byrne v. Van Hoesen*, 5 John. 66. *Field v. Schieffelin*, 7 John Ch. 150. *Holmes v. Seely*, 17 Wend. 75.) On the death of the father, the mother succeeded as such guardian, and could in that character enter on the lands of the heirs. (*Jackson v. De Watts*, 7 John. 157.) At common law this species of guardianship belonged only to such blood relative of the infant as could not by possibility inherit from him. Under the operation of our laws of descent, which allow both the father and mother, in certain contingencies, to inherit from the child, this species of guardianship has disappeared. But a substitute for it has been provided by the revised statutes. (1 R. S. 718, § 5. 2 *id.* 153, § 20.)

A lease executed by a testamentary guardian, or a guardian appointed under the statute, should not be made for a longer period than the full age of the infant; and if made for a longer time, will be void for the excess.

Executors and administrators may dispose of terms for years vested in them in right of the testator or intestate; and may lease the same for a less number of years; the rent so reserved will be assets in their hands. (*Bac. Abr. Lease*, I, 7.)

Joint tenants and tenants in common may either make leases of their undivided shares, or may join in a lease of the whole. (*Id.* No. 5.)

All persons, whether natural or artificial, though they be idiots, lunatics, infants or married women, are capable of being lessees. This is for the reason that a lease is always presumed to be beneficial to the person who takes it. When the lessee labors under disability at the time the lease is made, he may on the removal of the disability avoid such lease. A continued occupancy after the removal of the disability, would render the lease good. (*Cruise's Dig. tit. Lease*, 93.)

SECTION III.

Of Exchange and Partition.

1. Exchange is a mode of conveyance not used in this state. The object can be better accomplished by the grant, or bargain and sale by one party to the other, of the parts intended to be exchanged.

The statute in relation to dower seems, however, to contemplate

the existence of this form of alienation. It is provided that if a husband, seised of an estate of inheritance in lands, *exchanges* them for other lands, his widow shall not have dower of both, but shall make her election to be endowed of the lands given or of those taken in exchange. (1 R. S. 740, § 3.)

An exchange is defined to be a mutual grant of equal interests, the one in consideration of the other. The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of interest; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like. (*Per Gridley, J. in Wilcox v. Randall*, 7 Barb. 638, quoting 2 Bl. Com. 323.)

Coke says that there are five things necessary to an exchange:

1. That the estates given be equal.
2. That this word *excambium*, (exchange,) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution.
3. That there be an execution by entry or claim in the life of the parties.
4. That if it be of things that lie in grant, it must be by deed.
5. If the lands be in several counties, there ought to be a deed indented, or if the things lie in grant, albeit they be in one county. (*Co. Lit.* 51 b.)

In *Wilcox v. Randall*, (*supra*,) the supreme court held that the word *exchange*, as used in the foregoing section of the revised statutes relative to *dower*, is to receive the same interpretation which is applied to it, when used at common law, in reference to that species of conveyance; and therefore, to deprive the wife of her dower in lands conveyed by her husband, or to put her to an election, under the provisions of the statute, there must be a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other. In that case it was held, that a transfer of a mere equitable interest in 75 acres of land, derived under a lease in perpetuity, for 11 acres of land and \$700 in other property, did not constitute a legal exchange. (*See also Runyan v. Stewart*, 12 Barb. 542.)

The word *exchange* implied a warranty; and therefore, if either party was evicted of the premises taken in exchange, through defect of the other's title, he shall return back to the possession of his own by virtue of the implied warranty. Entry must be made by both parties in their lifetime; and if either party died before entry, the exchange was void. (2 Bl. Com. 323.)

The revised statutes, we have already seen, abolished all lineal

and collateral warranties, and directed also that no covenant should be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. (1 *R. S.* 738, 739, §§ 140, 141.) If an exchange, in its common law sense, can be made at all, it must, to be effectual, contain a special covenant with respect to title.

In England it is said that an exchange by lease and release is now the preferred mode, since the statute of uses executes the possession instantly upon the execution of the deed. With us, if that mode of conveyance be adopted, or that by grant or bargain and sale, no entry would be required and no covenant implied. (2 *Bl. Com.* 323, notes, *Sharswood's ed.* *Butler's note to Co. Litt.* 271 b, n. 1.)

With respect to a *deed of partition* it may be observed that it was anciently made in a deed to which all the joint tenants or tenants in common or parceners were parties. (*See several forms in 4 Newnam's Conveyancer*, 570 et seq.) In this state it has been repeatedly held that a parol partition between tenants in common, followed up by possession, is valid and will sever the possession. (*Jackson v. Harder*, 4 *John.* 202. *Same v. Bradt*, 2 *Caines*, 174. *Same v. Vosburgh*, 9 *John.* 270. *Same v. Livingston*, 7 *Wend.* 136, 141. *Corbin v. Jackson*, 14 *id.* 619. *Jackson v. Luquere*, 5 *Cowen*, 221. *Bool v. Mix*, 17 *Wend.* 119. *Ryers v. Wheeler*, 25 *id.* 434.)

It is more usual to make partition by some instrument in writing, under seal. When large tracts of land were granted, as was formerly the case to several, the practice was to have the same surveyed and laid out into lots, regularly numbered; and then, either amicably or by commissioners agreed upon, divide the lots amongst the proprietors, and all unite in a deed of partition, assigning and releasing to each proprietor the portion belonging to him. When partition is made in this way, the parties, after a lapse of above twenty years, will be concluded by it, and will not be permitted to show that the survey and partition were erroneous. (*Jackson v. Hasbrouck*, 3 *John.* 331.)

A mutual grant by one party to the other of the share to which the latter is entitled, will convert the joint estate into an estate in severalty. This is the preferable mode where the parties are few in number. Thus if there be three parties to the common estate, there must be a deed or a release from the two to one. In a joint

estate held by two, mutual grants to each other, or releases of the share allotted to each, should be given.

The mode of making partition of lands, tenements and hereditaments, held or possessed by joint tenants or tenants in common, when the parties are unable to agree, or any of them labor under disability, is prescribed by the revised statutes. (*Code of Procedure*, § 448. 2 *R. S.* 316.) This belongs rather to a treatise on the practice of the courts, than to our present subject, and enough has been said about it in a former part of this work. (*Part 1, ch. 7.*)

SECTION IV.

Of the derivative conveyances, Release, Confirmation, Surrender, Assignment and Defeasance.

The conveyances which have been treated in the three preceding sections are the *original* conveyances at common law. We propose now briefly to notice the above *derivative* conveyances. Where a man has the right of property and another is in possession claiming adversely, the real owner cannot grant or convey the land to a stranger, but may pass his estate in the land to the party thus in possession, by an instrument called a release. A release therefore is a conveyance of a right to a person in possession. A release to a person out of possession is inoperative. (*Bennett v. Irwin*, 3 *John.* 363.) It is said that a release may operate five ways : 1. By way of *enlarging* an estate. Thus, if he who has the remainder in fee releases to the tenant for a term of years or for life, in possession, and his heirs, this vests in the particular tenant the fee simple. (*Litt.* § 465.) To give operation to this release as such, the tenant must be in possession of some estate for the release to operate upon. 2. By way of *passing an estate*, as where one parcener or joint tenant releases to the other, the latter becomes seised in severalty of the whole. In these two cases there must be a privity of estate between the releasor and releasee ; that is, both estates together must make the fee. 3. By way of passing a right ; as if a man be disseised, and he who is disseised releases to the disseisor all his right. This changes the estate of the disseisor, which at first was tortious, into a rightful estate. This release to be effectual must be to one who has the whole right, or a fee simple. 4. By way of extinguishment. (*Litt.* §§ 479, 480.) This is where he to whom the release is made cannot lease that which is released to him, as

where a release is made to the tenant of the land of a rent charge, or common of pasture. (*Id.* § 480.) 5. By way of entry and feoffment, as if there be two joint disseisors and the disseisee releases to one of them, or becomes sole seised, and shall keep out his former companion. (2 *Bl. Com.* 325.)

The operative words of a release are *remise, release and forever quit-claim*. (*Litt.* § 445.) Such a conveyance, merely remising, releasing and quit-claiming to another, his heirs and assigns forever, though technically a release, has been held in this state to be a good conveyance by way of bargain and sale, and sufficient to pass the fee, though the releasee was not in possession. (*Jackson v. Fish*, 10 *John.* 456. *Beddoe v. Wadsworth*, 21 *Wend.* 120. *Lynch v. Livingston*, 2 *Seld.* 42.) It is, therefore, under the revised statutes, good as a grant. And it is for this reason that a release by one tenant in common to his companion will be good; because, though they have distinct freeholds, the one may convey to the other, which is well effected by the release.

A *confirmation* bears a strong resemblance to a release. It is defined by Coke to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased. (*Co. Litt.* 295 *b.*) The operative words of this conveyance are, according to Littleton, *give, grant, ratify, approve and confirm*. (*Litt.* §§ 515, 531.) A confirmation cannot work upon an estate that is absolutely void. An example of one branch of the definition is, if lessee for life should make a lease for thirty years, and die during the term: here the lease for thirty years is voidable by the reversioner. Yet if he had confirmed the estate of the lessee, in the lifetime of the tenant for life, the estate would be no longer voidable but sure.

A *surrender* is a conveyance, the converse of a release. The release operates by the greater estate descending upon the less. The *surrender* is the falling of the less estate into the greater. It is defined, by Coke, to be a *yielding up* of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them. The technical and proper words of this conveyance are, "*surrender and yield up*;" but any other form of words which manifests the intention of the parties, *will operate as a surrender*.

Formerly, a surrender might be made without deed, as by a tenant for life yielding up the possession to him in remainder or reversion, which was always favored in law. (*Co. Litt.* 338 a.) But now, by the statute of frauds, a surrender, like other conveyances of an estate or interest in land, is required to be in writing, subscribed by the party executing the same, unless in cases where it is accomplished by act or operation of law. (2 *R. S.* 135, § 6.) An instance of a surrender by operation of law is contained in *Livingston v. Potts*, (16 *John.* 28.) In that case it was held that where a lessee for years, for life, or *pur autre vie*, accepts a new lease or a grant in fee of the same premises, this, without any actual surrender of the old lease, is a surrender in law, or an implied surrender of it; and if the former lease gave the lessee a right of common in the other lands of the lessor, and no such right was granted by the second lease, it was further held that the common was extinguished by the surrender.

To make a surrender good, the person who surrenders must be in possession; and the person to whom the surrender is made must have a greater estate, immediately in remainder or reversion, in which the estate surrendered may merge. This is well illustrated by the case of *Springstein v. Schermerhorn*, (12 *John.* 357.) In that case, it appeared that a tract of 400 acres of wood land was leased by the proprietor of the manor of Rensselaerwick, in 1707, to A. *in fee*, reserving an annual rent, and granting reasonable estovers out of the woods of the manor, &c. In 1763, A. granted to his son B. part of the premises, with common of estovers, out of any part of the wood land of A.; and afterwards devised to his sons C. and D. the residue of the said tract, who, on the death of the deviser, entered and made partition. In 1791, an agreement was made between B., C. and D. and other tenants of the manor, with the then proprietor, by which the tenants agreed to surrender or release their former leases, and take new leases of the proprietor at a certain rent, and new leases were accordingly accepted, for their respective lands, by B., C. and D. It was held, that as there was no reversion in the proprietor of the manor, the acceptance of new leases did not operate as a surrender of the former estate, but that the lessees, having accepted new leases from the proprietor, in pursuance of the agreement, a release of the old was to be presumed. And further, that B. was thereby estopped from all claim under

the lease to him; and that for these reasons, the right granted to B. to take estovers from the other lands of A. was gone.

To make a valid surrender there must be a privity of estate between the surrenderor and surrenderee.

The possession necessary to enable a party to execute a deed of surrender need not be an actual *pedis possessio*. A conveyance of wild and uncultivated lands gives a constructive seisin thereof in deed to the grantee, and attaches to him all the legal consequences and remedies incident to the estate. (*Jackson v. Sellick*, 8 *John*. 262. *Same v. Howe*, 14 *id.* 405. *Bradstreet v. Clarke*, 12 *Wend.* 602. *Jackson v. Johnson*, 5 *Cowen*, 97.)

An *assignment* is properly a transfer of some particular estate or interest in lands, but is usually applied to the transfer of a term for years, or a bond and mortgage, judgment or other security. It differs from a derivative lease only in this, that by such lease the lessor conveys an interest less than his own, reserving to himself a reversion; whereas in an assignment the assignor parts with the whole interest in the thing assigned, and puts the assignee in his place.

The proper technical words of an assignment are, "*assign, transfer and set over.*" But any other words that indicate the intent, as *give, grant, bargain and sell*, will have that effect. No consideration is necessary to support the assignment of a term for years; for the payment of the rent, or other burdens attending the estate, are sufficient to vest the estate in the assignee.

Before the statute of frauds, chattels real might be assigned by parol; as personal property, or choses in action may be now by delivery only. (*Ford v. Stuart*, 19 *John*. 342. *Briggs v. Don*, *Id.* 95. *Prescott v. Hull*, 17 *id.* 284. *Canfield v. Munger*, 12 *id.* 284.) But the statute of frauds, which requires a deed or note in writing subscribed by the party, to render valid the alienation of an estate or interest in lands, embraces *assignments* among the instruments thus required to be in writing. (2 *R. S.* 135, § 6.)

The lessor may assign the rent without the reversion. (*Dema-rest v. Willard*, 8 *Cowen*, 206.)

With some exceptions created by the statute or the agreement of the parties, every estate and interest in lands and tenements may be assigned; and this is applicable also to an estate in incorporeal hereditaments, as rents, &c. Thus, by the statute relative

to uses and trusts, section 63, no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign, or in any manner dispose of such interest; but the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable. Enough has been said on this subject in the chapter on trusts.

The beneficial interest of a *cestui que trust* in the income of a fund for the support and maintenance, under a valid trust, which would have been invalid if created after the revised statutes, is transferable by him, but the beneficial interest of a *cestui que trust* in rents and profits is inalienable by statute. (*Bryan v. Knickerbacker*, 1 Barb. Ch. 409. *Wood v. Wood*, 5 Paige, 596.)

A naked power is not assignable, but a power coupled with an interest may be assigned. (*Osgood v. Franklin*, 2 John. Ch. 1. 14 John. 527.)

A *defeasance* is a collateral deed made at the same time with a grant or other legal conveyance, containing certain conditions, upon the performance of which the estate created by such deed may be defeated. The difference between a condition and a defeasance is that the first is contained in the deed, and the last in a separate deed, generally executed at the same time. We have seen in another place that the defeasance need not be executed at the same time as the deed, but may be made at a subsequent period. And where a deed has been by mistake made absolute in its terms, when intended to have been a mortgage, that a defeasance subsequently executed will be effectual to correct the error. (*Dunham v. Day*, 2 John. Ch. 182. 15 John. 555.)

A writing to operate as a defeasance to a deed must be of as high a nature, and must therefore be under seal. (*Coke's Litt.* 236 b. *Kelleran v. Brown*, 4 Mass. Rep. 443. *Flagg v. Mann*, 14 Pick. 479. *Eaton v. Green*, 22 id. 530.)

SECTION V.

Of the Conveyances which owe their Origin to the Statute of Uses.

We mentioned in the introduction of this chapter, that there were five of these instruments, which were derived from the statute of uses.

1. *The covenant to stand seised to uses.* This was a voluntary con-

veyance entered into in consideration of marriage. It was only made use of between near relations upon consideration either of marriage or blood. If made upon a pecuniary consideration, it has been upheld as a bargain and sale. This conveyance is obsolete in England, and probably does not exist at all in this state, at the present day. It is mentioned only because it formerly was employed amongst our conveyances, and is sometimes mentioned in our early reports.

The next of these conveyances is the *bargain and sale*, which is by far the most common mode of alienation in this state. It is a contract by which a person conveys his lands to another, for a pecuniary consideration, in consequence of which a use arises to the bargainee, and the statute immediately vests the possession.

It is well settled, upon authority, that a deed of bargain and sale, without any pecuniary consideration, is void. (*Jackson v. Sebring*, 16 *John*. 515 *Same v. Caldwell*, 1 *Cowen*, 622.)

It is not necessary that the consideration should be money. (*Spalding v. Hallenbeck*, 30 *Barb*. 292, 296.) It must, however, be a valuable consideration to the bargainor to raise a use, *a quid pro quo*. (*Jackson v. Pike*, 9 *Cowen*, 69.) In the last mentioned case, the deed was to the supervisors of the county of C., and the consideration was expressed to be, "as well for and in consideration of accommodating the said parties of the second part with a proper and convenient site for erecting a court house and jail for said county, as for increasing the value of property owned by the said parties of the first part, adjacent to the premises granted." This was held by the supreme court to be a valuable consideration, and that the deed was valid as a deed of bargain and sale. The chief justice said, the deed was given in consideration that a court house and jail should be built upon the land; which was done, and the grantors' lands were, in consequence, immediately and materially, enhanced in value by fixing the site, which was done upon the execution of the deed.

That a valuable consideration is necessary in a deed of bargain and sale, is established by all the cases. In addition to those cited *supra*, see also *Jackson v. Florence*, (16 *John*. 47;) *Same v. Delany*, (4 *Cowen*, 427.)

The words *for value received* are sufficient to raise a use. They

are evidence of a pecuniary consideration. (*Jackson v. Alexander*, 3 John. 484. *Same v. Root*, 18 id. 60)

It is not indispensable that the consideration should be expressed in the deed; though it is always most advisable to insert it in the instrument. If none be expressed, and a valuable consideration be proved, it is sufficient. (*Jackson v. Fish*, 10 id. 456. *Spaulding v. Hallenback*, 30 Barb. 292, 296.)

No precise form of words are required to raise a use. The proper and technical words are "*bargain and sell*;" but any other words that would have been sufficient to raise a use, upon a valuable consideration, before the statute, are now sufficient to constitute a valid bargain and sale. Thus, the words "*remise, release, and forever quit-claim*," or the words "*release and assign*," have been held to be sufficient to raise a use. (*Jackson v. Fish*, *supra*.) The words "*make over and grant*" have been held sufficient to pass lands by way of bargain and sale. (*Jackson v. Alexander*, *supra*. *Lynch v. Livingston*, 2 Seld. 422.)

A deed of bargain and sale, founded on a pecuniary consideration, to take effect *in futuro*, is effectual. (*Jackson v. McKenny*, 3 Wend. 233.)

In a deed of bargain and sale, a use can be limited to no other person than the bargainee, in whom the legal estate can be executed. (*Jackson v. Cary*, 16 John. 302. *Same v. Myers*, 3 id. 388.)

A rent may be reserved upon a conveyance of bargain and sale, and it is a sufficient consideration to support it. The consideration sufficient to support a bargain and sale has become, says Nelson, J. in *Rogers v. Eagle Fire Ins. Co.* (9 Wend. 619,) purely technical, without substance or value, and of course it is not important that courts should be over astute in the enforcement of the rule. A penny, a pepper corn, or red rose, has generally been adjudged a good consideration, by which he means a *sufficient* consideration. In the foregoing case, where A. by a deed poll, "in consideration of the performance hereinafter mentioned," granted all his estate, real and personal, to B. in fee, upon condition that B. should suffer and permit A. to remain in possession, and to use and enjoy all the said estate during his natural life, without yielding and paying any thing therefor; and that at the decease of A. the grantee should pay unto C. the sum of £100, and that during the natural life of A., the grantee should provide him with a maintenance; and in the deed was contained a clause in these words: "*And the said B.*

is to occupy and be in possession of my houses situate at the corner of Eagle street, for which he is to allow me £60 a year during my natural life;" and then, after some further provisions in relation to the management of the estate, the deed concludes with a clause, that *from and after the decease of A., the grantee and his heirs shall hold and enjoy the premises by the deed given and granted, and dispose thereof to his and their own proper use; it was held that the deed as to the house at the corner of Eagle street was valid and operative as a conveyance to B. for the life of A. subject to rent, with a remainder to him in fee without rent. And it was further held that the deed might well be considered a bargain and sale, under the statute of uses as to the house at the corner of Eagle street, conveying a freehold in futuro, the reservation of £60 a year during the life of the grantor being a sufficient consideration to raise the use.*

A bargain and sale, we have seen, is allowed still to be used as a mode of alienation, but it is deemed a grant under the statute. The principles which govern the one are applicable to the other. We have shown elsewhere some of the changes introduced into the revised statutes relative to conveyances, which it is not necessary to repeat. Most of them were borrowed from the decisions of the courts growing out of the conveyances to uses. (*See note to 2 Cruise's Dig. ch. 9, tit. 32, § 1, Greenl. ed. 2 Preston on Conv. 475 to 479.*) What has been said on the subject of deeds, the proof and acknowledgment and the recording thereof, appertains as well to the deed of bargain and sale as to the grant, or any other conveyance.

The *lease and release* is another mode of conveyance, which owes its origin to the statute of uses. It was formerly the most frequent instrument of assurance, but it fell into disuse in 1788, and is at present superseded by other and more simple assurances. It is however preserved by the revised statutes, and permitted to be used the same as formerly, but it is denominated a grant. It is in fact a bargain and sale for a year of the premises intended to be conveyed, and a common law release, operating by way of enlarging the estate. It was introduced originally in England to avoid both the statute of enrollment and the necessity of livery of seisin. The mode was for the vendor to convey to the vendee the estate to be conveyed by a bargain and sale for one or more years, and after the entry of the lessee, a deed of release of the inheritance was executed

to him in fee simple. The statute of uses transferred to the lessee the possession without an actual entry, and then the release of the reversion carried to the party whatever estate the releasor possessed. The lease and release were treated in the law as one conveyance. But one acknowledgment or proof was taken of the execution, and that was indorsed upon the release, which was alone recorded. It was not usual to record the lease, or to produce it on the trial of a cause to make out the title of the releasee to the premises. The recital of it in the release was deemed conclusive evidence of its existence upon all persons claiming under the parties in privity of estate. (*Carver v. Jackson*, 4 *Peters*, 88. *Cruise's Dig. tit. 32, Deed, ch. 11, § 6.*) Not only estates in possession, but estates in remainder and reversion can be conveyed by lease and release. The consideration to raise the use must be inserted in the lease. This is usually a nominal consideration of one dollar; but a reservation of a pepper corn rent has been held to be sufficient to raise a use in a bargain and sale to ground a release. As the release is a common law conveyance, no consideration need be expressed to make it valid, though it is usual to insert the true consideration, as has been recommended in other conveyances.

The statute with respect to the proof and acknowledging of deeds, and of the recording of them, is applicable to the lease and release, and the doctrine with respect to parties and covenants is the same in all cases.

Deeds to lead or declare the uses of other conveyances, and deeds of revocation of uses, were instruments of frequent occurrence in the English system of conveyance, and were occasionally used in this state. They are still admissible in some cases. The subject has already been considered in our chapter on trusts and powers, and of marriage settlements. There have been but few cases in this state arising upon conveyances made since the adoption of the revised statutes, in 1830.

CHAPTER VII.

OF ALIENATION OF REAL ESTATE BY THE ORDER OR PERMISSION OF
SOME TRIBUNAL OR PUBLIC OFFICER.

There are a variety of cases where the owner of real estate is under a disability to convey the fee without the order or authority of the court. We will instance some of these cases.

1. Religious corporations cannot convey their lands in fee simple, without the intervention of some court. The general act of 1784, (1 *Greenl.* 60,) while it authorized such corporations to lease, take, receive, acquire, purchase, use and enjoy lands, tenements and hereditaments &c. to a certain amount, limited their power of disposition to demise, lease and improve the same. Special acts of the legislature were occasionally passed, incorporating certain persons without restriction as to the power of alienation. The necessity for selling their lands in fee simple, and of making different investments, was often felt by religious corporations, and relief was occasionally granted by special acts of the legislature. (*See a reference to these acts, Will. Eq. Jur.* 734, *note.*) At length, in 1806, the general act was so amended that the chancellor was authorized, upon the application of any religious corporation, in case he should deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the moneys arising therefrom by the said corporation, to such uses as the same corporation, with the consent and approbation of the chancellor, should conceive to be most for the interest of the society to which the real estate so sold, belonged. (29 *Sess. ch.* 43, § 3.) But this provision did not extend to any of the lands granted by this state for the support of the gospel.

Since the abolition of the court of chancery, the application for leave to sell or mortgage the real estate of a religious corporation is made to the supreme court of the district, or the county court of the county where the religious corporation is located. (*Code*, § 30. *Judiciary act of 1847*, p. 323, § 16.)

The principal difficulty with respect to the alienation of real property held by a religious corporation was, that the legal estate in the hands of the purchaser, with notice of the trust, would be

chargeable with the charitable uses to which it was originally devoted. Real estate held by a corporation, for its ordinary purposes, or which it might acquire in the course of its business, might be sold and conveyed, and may be so still, in the same way as a natural person disposes of his own property. But real property held by a corporation to charitable uses, would be followed by a court of equity into the hands of the alienee with notice. This is the view taken of the subject, by the chancellor, in *Dutch Church v. Mott*, (7 Paige, 84.) And hence the necessity of the act, by which, with the leave of the court, real estate thus held in trust, may be aliened to a purchaser, free from the trust; so that the latter may take a clear and indefeasible estate in fee simple, freed from all charges thereon.

The mode in which the relief is granted is by petition to the court, showing the necessity and propriety of the application, and the assent of the persons interested beneficially in the property to the proposed sale and reinvestment. The deed should recite enough of the proceedings to give the court making the order jurisdiction, and should purport to convey the premises in pursuance of the order. In other respects the deed will resemble our statute grants, or the common deeds of bargain and sale. The most usual occasions for the application are, when the corporation is under the necessity of mortgaging their real estate to secure the payment of their indebtedness, or is desirous of changing the location of their religious edifice.

Another instance of persons under disability having to resort to the court for leave to sell their real estate, is in the case of *infants*. By the common law the rule seems to be universal, that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority, which latter are void. (*Bool v. Mix*, 17 Wend. 119. *Gillet v. Stanley*, 1 Hill, 121.) Such deed of lands executed by an infant cannot be avoided until he comes of age, though he may enter and take the profits in the mean time. (*Bool v. Mix*, *supra*.) Previous to the year 1814 there was no mode of disposing of the real estate of infants but by act of the legislature. Special acts were frequently passed for this purpose; when at length on the 9th of April, 1814, the legislature authorized the infant, by his guardian or next friend, to apply to the court of chancery by petition, setting

forth the grounds and reasons for the application, and the court was empowered to grant an order for the sale of such of the infant's real estate as was necessary and proper for his *support and maintenance*, and to take order for the investment and disposition of the proceeds. (*L. of 1814, ch. 108.*) By the act of the following year, this jurisdiction was so extended that the chancellor might order the real estate of infants to be sold, when the interests of the infants required it. (*L. of 1815, ch. 106.*) The application was conducted in a summary way, under a rule adopted by Chancellor Kent, framed specially for that purpose, in obedience to the requirement of the act. (*Ex parte Quackenboss, 3 John. Ch. 408.*) The existing law is a revision of the foregoing statutes, and prescribes the mode of the proceeding, so as adequately to protect the rights of the infant, and directs that whenever it shall appear satisfactorily that a disposition of any part of the real estate of the infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education; or that the interest of such infant requires or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reason or circumstances, the court may order the letting for a term of years, the sale or other disposition of such real estate or interest, to be made by such guardian or guardians so appointed, in such manner and with such restrictions as shall be deemed expedient. But no real estate or term for years shall be sold or disposed of in any manner against the provisions of any last will, or of any conveyance by which such estate or term was devised or granted to such infant. (*2 R. S. 195, §§ 175, 176.*) It was not the practice of the late court of chancery to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; nor for the mere purpose of increasing the income of an adult owner of a present interest in the estate. (*Matter of Jones, 2 Barb. Ch. 22.*)

It is quite clear that the jurisdiction of the court of chancery to order the sale of real estate belonging to infants was derived entirely from the statute. A sale, therefore, made by order of the court contrary to the provisions of the statute was utterly void, and passed no title to the purchaser. (*Rogers v. Dill, 6 Hill, 415.*)

The mode of conducting the proceedings was by petition of the infant by his guardian or next friend. The court appointed the

general guardian, if there was one, if he could give the requisite security; if he had no general guardian, that fact should be stated in the petition, when a special guardian was appointed for that purpose. The matter was then referred to a master, whose duty it was to examine as to the age of the infant, and the actual value of his interest in the property, so far at least as to determine whether the value, as stated in the petition, is substantially correct; and he was required to certify what sum was requisite under the rule, and that the sureties of the guardian were worth that sum over and above all debts. (*Matter of Lansing*, 3 Paige, 265. *Matter of Wilson*, 2 id. 412.) The master was required to take testimony as to the facts, and report the result briefly. (*Matter of Morgan*, 4 Paige, 44.)

The mode of proceeding is now substantially the same, a reference to a referee instead of a master being necessary since the abrogation of the latter office. The statute contains suitable provisions as to the right of dower, if any, in the premises. The deed, which is authorized by the court, is executed by the special guardian, and should recite the proceedings, or enough thereof to give jurisdiction to the court, and should purport to be by order of the court and in pursuance of the statute. The granting clause is substantially like the statute grant, or a deed of bargain and sale. It merely conveys to the purchaser and his heirs, and covers all the estate which the infant had in the premises, and without any covenants for title. The statute provides that all sales, leases, dispositions and conveyances made in good faith by the guardian in pursuance of the order of the court, when confirmed by the court, shall be valid and effectual as if made by such infant when of full age. (2 R. S. 195, § 178.)

These sales are conducted in a summary way, and without the notoriety which attends adverse proceedings in courts. If fraudulently conducted, or the requisite steps to pass the title be omitted by carelessness or design, the title may prove defective, and the whole proceedings be void. (*See Clark v. Underwood*, 17 Barb. 202. *Rogers v. Dill*, *supra*.) The deed should be proved or acknowledged, and recorded.

Analogous to the condition of infants is that of idiots, lunatics, persons of unsound mind, and habitual drunkards, against whom a commission has been awarded, after their estates have been put in the hands of a committee. From that period their power of alien-

ation of it is taken away. The statute provides that on a proper application of the committee, by petition, the court may order the mortgage, leasing or sale of the whole, or such part of the real estate as may be necessary to *discharge the debts* of the party thus laboring under this disability. (2 R. S. 54, § 13.) A subsequent section confers the same power upon the court to order a mortgage, lease or sale, if the personal estate be insufficient for the maintenance of the party thus disabled, or for the education of his children. (*Id.* § 16.) These objects, the payment of debts, and the support and maintenance of the lunatic and his family, or the education of his children, are the limits of the power of the court. (*In the matter of Petit*, 2 Paige, 596.) The estate cannot be sold on the application of the committee, for the purpose of improving the investment. This can be done only by act of the legislature.

The deed given by the committee should, as in the case of a sale of infants' estates, recite enough of the proceedings to give jurisdiction to the court, and state the substance of the order, and then contain the usual granting clause, as in other deeds. The party investigating the title under these sales must be careful to see that the court had jurisdiction to make the order, and that the requisite jurisdictional steps had been taken by the committee. The deed contains no covenants for title.

The real estate of deceased persons can only be aliened by their personal representatives, by proceedings in the surrogate's court of the county, on the application of the executors or administrators, within three years from the date of their letters testamentary or of administration. The mode of conducting these proceedings, and the circumstances which render the application proper, will be found discussed in treatises on the practice of surrogates' courts, to which the reader is referred. (*Will. on Ex. p. 306, et seq.*) In investigating the title of the purchaser under these sales, the main inquiry is, whether the court had acquired jurisdiction of the parties and subject matter, before making the order, and whether the sale had been conducted with fairness, and freedom from such irregularities as render it void.

Even if the proceedings before the court be, in all respects, in conformity to the statute, and the sale be conducted on proper notice, it may still be invalid, if the purchase is made by the executors or administrators for their own benefit, or by persons standing in confidential relations to the owners of the estate. The law, for

the wisest of purposes, prohibits a party from purchasing, on his own account, that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. (*Will. Eq. Jur.* 605, 606, and *the cases there cited.*) The statute has applied these principles to the sales under the order of the surrogate, and prohibited the executors or administrators, and guardians of minor heirs of the deceased, from being interested in the purchase of any of the real estate of the deceased so sold. All sales made contrary to the provisions of that section of the act are declared to be void; but an exception is made in favor of a purchase by a guardian for the benefit of his ward. (2 *R. S.* 105, § 27. *Will. on Ex'rs*, 326. 2 *Sug. Vend. Perk. ed.* 362 *et seq.*)

The conveyances are to be executed by the executors or administrators, or by the person appointed by the surrogate to conduct the sale. They are required to contain and set forth at large, the original order authorizing a sale, and the order confirming it, and directing the conveyance to be made.

Prior to 1850 surrogates' courts were held to great strictness in the conducting these sales. They were treated as courts of inferior and limited jurisdiction; and those claiming under their decrees were required to show affirmatively that the court had authority to make the decree, and that the facts upon which the surrogate acted gave him jurisdiction of the subject matter, and of the persons before him. (*Dakin v. Hudson*, 6 *Cowen*, 221. *Bloom v. Burdick*, 1 *Hill* 130. *Corwin v. Merrill*, 3 *Barb.* 331. *People v. Barnes*, 12 *Wend.* 492.)

The act of March 23, 1850, ch. 82, changed the foregoing rules, and placed the sale by order of surrogates' courts, as well those theretofore made as those thereafter to be made, on the same footing as if made by order of a court having original general jurisdiction. It provides that a purchase, at any such sale in good faith, shall not be impeached or invalidated, by reason of any omission, error, defect or irregularity in the proceedings before the surrogate, or by an allegation of want of jurisdiction on the part of the surrogate; except in the manner and for the causes that the same could be impeached or invalidated, in case such sale had been made pursuant to the order of a court of original general jurisdiction. The statute in the second and third sections directs that certain specified defects, which the courts had formerly held to be fatal, should

no longer render the sale invalid. These sales, with respect to their validity, stand upon the same grounds that are occupied by the sale of infants' estates under the general laws conferring jurisdiction upon the supreme court and county courts over these estates. In all these cases, a want of jurisdiction in the court would be fatal to the proceedings. The main difference between the present law and the former practice is, that the regularity and jurisdiction are now presumed in favor of the proceeding, whereas formerly they had to be shown, and no presumption was indulged in their behalf.

The surrogate had no jurisdiction to order the sale of real estate of the testator for the payment of debts, if the testator had *charged* the payment of his debts upon his real property. (2 R. S. 105, § 32.) The remedy of the creditor to enforce such charge is in equity. If the executor has devised his lands to his executors in trust to pay debts, or simply empowered them to sell the lands for that purpose, the surrogate has no jurisdiction over the subject to compel the execution of the power, or to order the sale of the lands, but the jurisdiction, in that respect, is in equity. With regard to what direction in a will amounts to a charge on the real estate, in favor of creditors or legatees, so as to oust the surrogate of jurisdiction, see *Lupton v. Lupton*, (2 John. Ch. 614, 624;) *Willard on Ex'rs*, 328, and the subsequent chapter on devises.

With respect to the disability of married women to convey their real estate, there are but few instances where the consent and approbation of a public officer is necessary. In general, a married woman can alien her real estate, or her inchoate right to dower, by uniting with her husband in a conveyance of it by any of the instruments recognized by the law, as grant, bargain and sale, &c. and acknowledging the same, on a private examination, apart from her husband, that she executed it freely, and without any fear or compulsion of her husband. (1 R. S. 758, § 10.) Enough has been said on this subject in a previous section. In these cases, the conveyance is not made by *order of the officer* who takes the acknowledgment. But there are a few instances where an order has to be obtained to give effect to the conveyance, either to or by a married woman.

Thus, the trustee of a married woman of real or personal estate, under any deed of conveyance or otherwise, may, on the written request of such married woman, accompanied by a certificate of a

justice of the supreme court, that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues or profits thereof, for her sole and separate use and benefit. (*L. of 1849, ch. 375, p. 528, § 2.*) The inquiry by the judge as to the capacity of the married woman is not usually extended farther than to see that she is not laboring under any other disability, as infancy &c., and that she acts freely and without restraint or coercion. When she becomes seised of the property in her own right, her power of disposition over it is governed by the same rules as those which regulate her alienation of her private property. We have seen that she can dispose of it as if she were sole. (*See ante, p. 391.*)

The act of 1860, chapter 90, has gone further in some respects than the act relative to the rights of married women, passed in 1849, and in other respects has fallen short of it. The act of 1849 authorized a married woman to take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same was declared not to be subject to the disposal of her husband, nor liable for his debts. (*L. of 1849, p. 528.*) Thus, the ownership of real estate by a married woman was accompanied by the unrestricted *jus disponendi*.

The act of 1860 extended the ownership of a married woman further, but imposed some limitations on her power of alienation. It interferes very essentially with the marital rights of the husband, as they existed at common law. It declares that the property, both real and personal, which any married woman now owns as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labor or services, carried on or performed on her sole or separate account; that which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts

as may have been contracted for the support of herself or her children by her, as his agent. (*L. of 1860, p. 157.*)

With respect to her real estate as her separate property, a married woman is authorized, by the third section of the same act, to bargain, sell and convey such property, and enter into any contract in reference to the same; but no such conveyance or contract is valid without the assent in writing of her husband, except in certain cases which will soon be noticed. This is a restriction upon the power of alienation by a married woman not contained in the act of 1849. The legislature failed to carry out the principles on which the law is based—the separate ownership of property, of which the *jus disponendi* is an incident.

It was foreseen that there might be cases in which the assent of the husband, to the disposition of her property by the wife, could not be procured. In case this is occasioned in consequence of his *refusal*, absence, insanity or other disability, she may apply on petition to the county court of the county where she resides, for leave to make such sale, and that court, on examining into the grounds of the application, may, in its discretion, order notice of the application to be given to the husband.

If it appears to the court that the husband has willfully abandoned his said wife, and lives separate and apart from her, or that he is insane, or imprisoned as a convict in any state prison, or that he is an habitual drunkard, or that he is in any way disabled from making a contract, or that he refuses to give his consent, without good cause therefor, the court may cause an order to be entered upon its records, authorizing such married woman to sell and convey her real estate, or contract in regard thereto without the assent of her husband, with the same effect as though such conveyance or contract had been made with his assent.

What shall be a *good cause* for the husband to withhold his refusal, when he is laboring under no disability, has not yet been decided. But if he gives his assent, or if having refused it, and the court shall have authorized the sale by an order in its records, the conveyance should contain recitals of the necessary facts to authorize the married woman to convey.

The *assent* of the husband to such conveyance by the wife would be decisively manifested by his uniting with her in the deed. It may, it is presumed, be in a separate instrument; and if that course be adopted, the assent should be recited in the deed of the wife,

and the original should be annexed to it. A party deriving title under such sale, would need for his protection some evidence of the husband's assent.

The act of 1860 does not, like that of 1849, except in terms, a gift or grant from the husband to the wife, as a source of her title. But probably the act of 1849 was merely in affirmance of the common law, and if so, it is equally applicable to the act of 1860, as the common law is not presumed to be changed unless there is a manifest intention on the part of the lawgiver, to make an alteration.

The sale and conveyance of mortgaged premises, on a foreclosure, is the result of judicial proceedings, and the title is conveyed by the act or permission of some tribunal or public officer. Enough was said on this subject, when we were treating of mortgages, in a former chapter. It is sufficient to add, that by the code of procedure, when real property is adjudged to be sold, it must be sold in the county where it lies, by the sheriff of the county, or by a referee, appointed by the court for that purpose, and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance is declared to be effectual to pass the rights and interests of the parties adjudged by the decree to be sold. (*Code*, § 287, *as amended in 1849.*)

The title derived from the sale by a sheriff, under an execution issued upon a judgment of courts of record, or of such other judgments as are made a lien upon the real estate of the debtor, owes its origin to modern legislation, and was unknown to the common law. Parties were subjected to rigorous imprisonment for the non-payment of judgments, long before their real estate could be reached by an execution. It is not deemed expedient to trace the origin of the changes in this state, with respect to this matter. Imprisonment for debt was abolished in 1831. (*L. of 1831, p. 396, ch. 300.*) The real estate of the judgment debtor was made liable for his debts many years before that time; and the necessity of reaching his equitable interests has been made more urgent by the entire freedom of his person from arrest and imprisonment for debt, except in cases of fraud, and a few other instances. The sale and conveyance of real estate, under judgment and execution, alone falls within the scope of this work.

To enable the party to sell the real estate of the judgment debtor under an execution, the judgment must be a lien upon the estate.

Such judgment, followed up by an appropriate execution, contains a statute authority to the sheriff or other officer empowered to act in that behalf, to sell the real estate of the debtor, if the personal estate proves insufficient to satisfy the judgment.

To make the judgment effectual for this purpose it must be docketed in the office of the clerk of the county where the lands sought to be charged lie; and it continues such lien upon such lands, and any other which the debtor may acquire thereafter, for ten years from the time of docketing the same in the county where it was rendered. A judgment rendered by a justice of the peace for twenty-five dollars or upwards may be also docketed in the county where it was rendered, and becomes in like manner a lien from the time of filing and docketing the transcript. A certified transcript of the judgment may be filed and docketed in any county, with the like effect in all respects as in the county where the judgment was rendered. A judgment of a justice when docketed becomes a judgment of the county court. (*Code*, §§ 63, 262. 3 *R. S.* 642, 5th ed.)

An execution to enforce the judgment may be issued at any time within five years after the entry of the judgment, without special leave of the court; after the expiration of that period it can only be issued by leave of the court, on a motion for that purpose, of which previous notice should be given. (*Code*, §§ 283, 284.) The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued; and shall require the officer, if it be against the property of the judgment debtor, to satisfy the judgment out of the personal property of such debtor, and if sufficient property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter. (*Code*, § 289.) There are other forms of execution, but it is of this we have to do at present. The execution is returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed.

With regard to the kind of real property which may be sold

under an execution, and from what time it is bound, it may be remarked that no judgment becomes a lien from the time of the docketing it upon a mere chattel interest, but only upon a freehold. A term for years is not bound by the docketing of a judgment. (*Vredenburg v. Morris*, 1 *John. Ch.* 223. *Merry v. Hallet*, 2 *Cowen*, 497.) Nor are estates at will or at sufferance liable to be sold under an execution. (*Colvin v. Baker*, 2 *Barb.* 206.) It is only an estate amounting to a freehold that is liable to the lien created by the docketing of a judgment. The estate of a tenant by the curtesy may be sold under an execution. (*Schermerhorn v. Miller*, 2 *Cowen*, 439.) By parity of reasoning, an estate in dower, or a conventional life estate, may be sold by the sheriff by virtue of an execution on a judgment against the tenant for life.

The property which is bound by the docketing of a judgment is the real property *corporeal*, and not *incorporeal*. The term "lands, tenements and real estate," which are subject to such lien, is used by the act in a popular sense, as embracing things tangible. And hence a rent reserved upon a conveyance in fee of land is not subject to such lien, or liable to be sold on execution, though the conveyance contain a clause of distress and a provision for re-entry. (*Payn v. Beal*, 4 *Denio*, 405, *overruling the People v. Haskins*, 7 *Wend.* 463.)

The question how far the interest of a person in possession of land, who has no legal title to it, may be affected by a sale, is an interesting subject of inquiry. The matter was considered by the chancellor, in *Talbot v. Chamberlain*, (3 *Paige*, 220.) Previous to the revised statutes, says the chancellor, if the judgment debtor was in possession of land at the time of the sale thereof on an execution against him, he was estopped from denying that he had any interest in the land. The bare possession was an interest which might be sold on execution, and the purchaser acquired the same interest which the defendant in the execution had, and no more. If the latter was a mere tenant at will or by sufferance, or even was in possession without color of right, the purchaser, as against him and those claiming under him, had a right to be substituted in his place so far as respected the possession and any legal rights of the defendant connected therewith. (*Jackson v. Graham*, 3 *Caines*, 188. *Jackson v. Parker*, 9 *Cowen*, 84.) Possession was considered to be such an interest in land as to be the subject of sale under

execution, and such is the rule now where the case does not fall within the statute.

If the defendant was in under a contract to purchase, and had actually paid all the purchase money, so that the vendor held the premises as a mere naked trustee for the use of the defendant, his equitable interest also passed under a sale by the sheriff. (1 *John. Ch.* 56. 17 *John.* 356.) The revised statutes have altered the law in these respects, by prohibiting the sale on execution at law, of the interest of a person *holding a contract for the purchase of land.* (1 *R. S.* 744, § 4.) Even if the purchaser has paid the whole purchase money, if he had not obtained the legal title, the court thought his possession under the contract could not be sold under an execution at law. The remedy was in equity alone. (*Watson v. Le Row*, 6 *Barb.* 481. *Brewster v. Power*, 10 *Paige*, 562. *Griffin v. Spencer*, 6 *Hill*, 525. *Boughton v. The Bank of Orleans*, 2 *Barb. Ch.* 458.)

But where a trust results under the statute, relative to trusts, (§§ 51, 52,) in favor of the creditors of a person paying the consideration and taking the grant in the name of another, such person takes an equitable title as respects his then creditors, which is converted into a legal one in their favor by the statute, (*Id.* § 45,) so that they may sell the land under the judgments for their debts, as they could under the former statute, and are not obliged to resort to a court of equity. (*Wait v. Day*, 4 *Den.* 439, *disapproving a dictum of the chancellor in Brewster v. Powers, supra.*)

Prior to the act of April 12, 1820, (*L. of 1820, p.* 167,) the sale by the sheriff under an execution, and the delivery of a deed to the purchaser on the payment of the bid, divested the estate of the judgment debtor. (*Catlin v. Jackson*, 8 *John.* 520.) Real estate was sometimes sacrificed at such sales. The oppression and injustice which occasionally arose in those cases led to the redemption act of that year, which has since been revised and improved, and now forms an important part of our jurisprudence.

By the terms of the execution, the personal property of the debtor is the primary fund out of which it is to be satisfied. If there be none, or it proves insufficient, resort is then had to the real estate of which the judgment debtor was seised on the day of the docketing of the judgment, or at any time afterwards, in whose hands soever the same may then be. (2 *R. S.* 367, § 24.)

The statute contains minute directions to the sheriff for regula-

ting and conducting the sale; requiring a notice of the time and place of sale to be published for six weeks in a newspaper in the county, if there be one, describing the property with common certainty; and requiring the sale to be at public vendue between the hours of nine in the morning and the setting of the sun; and imposes a penalty of a thousand dollars on the sheriff, in addition to his liability to the party injured, for all the damages he may have sustained, for a failure on his part to comply with the requirements of the statute. But these and other provisions of the law are directory to the sheriff, and will not invalidate the sale to a *bona fide* purchaser. (*Groff v. Jones*, 6 *Wend.* 522. *Neilson v. Neilson*, 5 *Barb.* 565.) Proof of the judgment, execution and sale by the usual documentary evidence, followed up by the production of the sheriff's deed, is all that is required. A party investigating a title under a sheriff's sale, is not, in general, required to look farther than the deed and the judgment, execution and sale recited in it. Third persons, acting in good faith, are not chargeable with notice of any infirmity in the title occasioned by the non-compliance of the sheriff with the directions in the statute. If, indeed, the judgment had been satisfied before the sale, even a bona fide purchaser would acquire no title. In such a case, the sheriff has no subsisting power to sell, and of this the purchaser must take notice at his peril. (*Id.* *Wood v. Colvin*, 2 *Hill*, 566.) Much more will this be so, if the purchaser had notice, before the sale, of the payment of the judgment. (*Jackson v. Anderson*, 4 *Wend.* 474.) It would greatly impair the confidence in public sales of real estate by the sheriff, if their validity might be affected in the hands of a bona fide purchaser, by the irregularities of the sheriff, or his omission to make a proper return to the execution. (*Neilson v. Neilson*, *supra*, p. 568.)

The existing law with respect to a redemption of the property sold, is a revision of the act of 1820. It provides for a redemption, 1st, by the judgment debtor, and 2d, on his failing to redeem, within the time prescribed, by a judgment creditor.

1. *By the judgment debtor.* The sheriff on the sale makes duplicate certificates thereof, describing the premises sold, the price bid for each distinct parcel, the whole consideration paid, and the time when the sale will become absolute and the purchaser will be entitled to a conveyance, pursuant to law, which will not be until the expiration of fifteen months from such sale.

The judgment debtor has the prior right to redeem within one year from the sale, by the payment to the purchaser, his personal representatives, or to the officer who made the sale, for the use of the purchaser, the sum of money which was bid on the sale of such lot or tract as he desires to redeem, with the interest on that sum from the time of sale, at the rate of ten per cent a year. The judgment debtor is not bound to redeem the whole premises sold, when they consist of separate lots, or parcels, and were sold separately, but may redeem any one or more of them at his option. (3 R. S. 651, § 61, 5th ed.) The right is not confined to the party whose right and title were sold; but in case he be dead, it may be exercised by his devisee of the premises sold, if they shall have been devised, and if they shall not have been devised, by the heirs of such person; or by a grantee of such person who shall have acquired an absolute title by deed, sale under a mortgage, or under an execution, or by any other means, to the premises sold, or to any lot, tract, parcel or portion which shall have been separately sold. (*Id.* § 62.)

A sale of lands under a judgment perfected by a deed, destroys the lien of the judgment. But if the sale be for a less sum than the amount of the judgment, and the premises be redeemed by the judgment debtor himself, the premises may be resold by the sheriff under the same execution, for the balance remaining unpaid. The judgment by such redemption is only paid *pro tanto*, but remains a valid lien for the residue. (*Titus v. Lewis*, 3 Barb. 70.)

The party who seeks to redeem as standing in the place of a grantee of the judgment debtor, is not entitled to redeem upon a mere *equitable* right, but he must have the legal estate. (*Lathrop v. Ferguson*, 22 Wend. 116.)

The officer who conducts the sale may authorize the deposit of the redemption money with the county clerk, or in a bank, and the payment to such person or bank will be a valid payment. But the redemption, to be effectual, must be by payment of the whole sum to which the purchaser is entitled for the premises sought to be redeemed. If the calculation be made by the party himself, and by a miscalculation his payment falls short of the sum due, the redemption is ineffectual at law, and the purchaser who obtains the sheriff's deed of the premises is entitled to the legal estate. But if the sheriff himself makes a miscalculation of the interest, and thereby misleads the redeeming party, the redemption is valid and effectual, and the sheriff must make up the deficiency arising from his own

mistake. (*Hall v. Fisher*, 1 Barb. Ch. 56. *Dickinson v. Gilliland*, 1 Cowen, 481. *Ex parte Peru Iron Company*, 7 id. 540. *The People v. Rathbun*, 1 Smith, 528.)

2. *By a creditor.* If the judgment debtor omits to redeem within the year, the right of redemption devolves on certain creditors of the debtor by judgment or mortgage, within three months after the expiration of the year. The fifteen months allowed to creditors, &c. are calendar, not lunar months. (*Snyder v. Warren*, 2 Cowen, 518.) When the last day of the fifteen months happens on Sunday, the redemption must be made the day before. (*The People v. Luther*, 1 Wend. 42.)

The provisions with respect to redemption by creditors, after the expiration of the year from the sale, are that any creditor, having in his own name, or as assignee, representative, trustee or otherwise, a decree in chancery or a judgment at law, rendered at any time before the expiration of fifteen months from the time of such sale, or having a mortgage duly recorded within the same period, and which shall be a lien and charge upon the premises sold, or upon any parcel which shall have been separately sold, by paying the sum of money which was paid on the sale of such premises, or upon any parcel which shall have been separately sold, together with the interest thereon, at the rate of seven per cent a year from the time of such sale, shall thereby acquire all the rights of the original purchaser, subject to be defeated by any other like creditor in the manner mentioned in the several statutes on this subject. (3 R. S. 652, § 67, 5th ed. *Laws of 1847*, ch. 410. *L. of 1836*, ch. 525.)

The statute points out how one creditor may redeem from another, and the evidence to be furnished to the officer in all cases of redemption. (3 R. S. 653, 654, 5th ed.)

The deed of the sheriff is not given until the expiration of fifteen months from the time of the sale. It is then given to the original purchaser, or the redeeming creditor, as the case may be, and the conveyance is declared to be valid and effectual to convey all the right, title and interest which was sold by the officer. (*Id.* 655, § 79, 5th ed.)

The deed relates back to the time of the sale, though executed afterwards, and after the time of redemption has expired. (*Jackson v. Dickinson*, 15 John. 309. *Same v. Ramsay*, 3 Cowen, 75. *Wright v. Douglass*, 2 Comst. 373.) The sale and deed extin-

guish all junior liens upon the premises. (*Ex parte Stevens*, 4 Cowen, 133.) The purchaser under a judgment, or the party redeeming, as the case may be, acquires all the title of the judgment debtor, and takes the benefit of covenants and estoppels running with the land. (*Sweet v. Green*, 1 Paige, 473. *Kellogg v. Wood*, 4 *id.* 578.) He takes the land subject to all prior incumbrances and liens of which he has actual or constructive notice. (*Bartlett v. Gale*, *Id.* 503.)

In general, objections to the *regularity* of the sheriff's sale of land, cannot be raised by strangers to the execution. (*Smith v. McGowan*, 3 Barb. 404.) A misrecital of the judgment, as to date and amount, the recital being in all other respects correct, will not vitiate the sheriff's deed. (*Jackson v. Streeter*, 5 Cowen, 529.) If the deed contain a correct description of the premises sold, a variance between it and the sheriff's certificate of sale will not affect the purchaser's title. (*Jackson v. Page*, 4 Wend. 585.)

The purchaser cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment, to which he is a stranger. (*Jackson v. Bartlett*, 8 John. 361.)

There is a distinction between proceedings and judgments which are absolutely *void*, and such as are merely *erroneous*. In the first case no title can be acquired under a sale by virtue of a *void* judgment; but if the judgment be merely *erroneous*, and be reversed for such error after the sale, and purchase by the bidder, the title so acquired will not be divested by the reversal. The reason given for this is, that great inconvenience would follow a contrary doctrine, so that none would buy of the sheriff in such cases, and execution of judgments would not be done. It was held in *Drury's case*, (8 Co. 142,) that if an erroneous judgment be given, and the sheriff, by force of a *fiери facias*, sells a term of the defendant, and afterwards the judgment is reversed by a writ of error, yet the term shall not be restored, but only the money, because the sheriff was commanded and compelled by the king's writ to sell. This is the uniform current of the authorities, and it is applied by our courts to the sale of the fee simple, as well as of term for years. (*Woodcock v. Bennett*, 1 Cowen, 734. *Wood v. Jackson*, 8 Wend. 9.)

The same distinction exists between *void* and *erroneous* process. If the process under which a sale was made is set aside for *irregu-*

larity, that is, on the ground of its being *void*, the sale itself is void, even in the hands of an innocent purchaser. But if the *process* be merely *erroneous*, as when it was issued, formerly, without a *scire facias*, after a year and a day from the docketing of the judgment; or when, under the present practice, it is issued after five years from the rendering of the judgment, without leave of the court, the process is only voidable on the application of the party, and the sale is good, and cannot be questioned as against a *bona fide* purchaser. (*Id.* *Jackson v. Bartlett*, 8 *John.* 361. *Same v. DeLancy*, 13 *id.* 537.)

We have seen already that the sheriff, in advertising real property for sale, must describe it with common certainty. In his deed to the purchaser, nothing passes under a general description of "*all other the land &c. of the defendant*," for the sheriff cannot sell under so vague a description. In short, he can sell nothing which the creditor cannot enable him to describe with reasonable certainty. (*Jackson v. DeLancy*, 13 *id.* 537.)

The purchaser acquires nothing but a lien before the time of redemption has expired. (*Vaughn v. Ely*, 4 *Barb.* 159.) And the debtor is left in the use and enjoyment of the property during the fifteen months; and his title is not divested until the expiration of that time. But if the real estate sold is not redeemed within that time, and the sheriff executes to the purchaser a deed of the same, in pursuance of the sale, the grantee in such deed is deemed vested with the legal estate, from the time of the sale on the execution, for the purpose of maintaining an action for any injury to such real estate. (2 *R. S.* 373, § 78. 3 *id.* 655, 5th ed. *Rich v. Baker*, 3 *Den.* 79. *Boyd v. Hoyt*, 5 *Paige*, 65. *Talbot v. Chamberlain*, 3 *id.* 219. 2 *R. S.* 337, § 23.) The statute thus wisely converts the fiction of a title by relation to the time of the sale, into an instrument of justice.

The deed of the sheriff should recite the judgment and execution, showing the time when the lien attached, the sale and purchase, and redemption, if any, and then, in consideration thereof, and of the payment of the sum bid and paid, and of the statute in such case made and provided, should grant and convey unto the grantee, his heirs and assigns forever, all the estate, right, title and interest, which the judgment debtor had in the premises on

the day of the docketing of the said judgment, or at any time afterwards. It should contain a full and accurate description of the premises. It should be proved or acknowledged like other deeds, and recorded in the clerk's office of the county where the lands are situated.

The sale of lands for taxes by the comptroller, occasions the alienation, every year, of large tracts of land. It is not proposed to analyze the laws on this subject as they have been repeatedly modified. The act of 1850, amending the revised statutes, (1 *R. S.* 411, § 81,) enacts, that conveyances of lands sold for taxes shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, state engineer and surveyor or treasurer, and every conveyance of land sold for taxes heretofore or hereafter executed by the comptroller, either in his own name or in the name of the people of this state, shall be *presumptive evidence* that the comptroller had authority to sell and convey the land described in it, for arrears of taxes charged thereon, and that all proceedings, things and notices required by law to be had, done or given, prior to the execution of such conveyances by the comptroller, have been had, done and given, as required by law; but such presumption may be rebutted by legal evidence. But this section shall not be applicable to any such conveyance, in case the grantee therein or those claiming under him shall neglect or refuse to release to the owner, occupant or claimant of the premises described therein, or any part thereof, said premises, upon being paid, or upon a tender thereof made, the purchase money named in said conveyance, with interest at the rate of ten per cent per annum, and the costs of any suit commenced for the recovery of the said premises, or any part thereof. (*L. of 1850, ch. 183, § 81. See Tallman v. White, 2 Comst. 66, which arose before the 81st section was amended.*)

The revised statutes, before their amendment in 1850, made the comptroller's deed *conclusive* evidence of the regularity of the sale. This conclusiveness has been held only to apply to the proceedings to be had after the right and power to sell are acquired. It is not conclusive or even presumptive evidence of the regularity of the assessment. (*Tallman v. White, supra.*)

There are a variety of cases where the real estate is bound by corporation assessments or by taxes. (*Mayor of Troy v. The Mu-*

tual Bank, 6 *Smith*, 387.) In some cases, it is presumed, the statute provides for the effect of the deed given on a sale for non-payment of taxes or assessments. If there be no provision in the act, the common law must prevail. In the absence of any legislation on the subject, the purchaser is bound to inquire into the authority of the officer who sells, and if that is insufficient the sale is void. Analogous questions have repeatedly arisen and been decided in conformity to this view of the subject, by the supreme court of the United States. (*Stead's Ex'rs v. Course*, 4 *Cranch*, 403. *Williams v. Peyton's Lessee*, 4 *Wheat*. 77.) The general principle is, in the case of a naked power not coupled with an interest, that every prerequisite to the exercise of the power should precede it. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed may depend. For example, if the lands be sold for the non-payment of taxes, the marshal's deed is not evidence, even *prima facie*, that the prerequisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with. (*Williams v. Peyton's Lessee*, *supra*.)

The rule is substantially the same in this state. The recitals in the deed given on such sale are not evidence of the facts stated in them. (*Jackson v. Shepard*, 9 *Cowen*, 88. *Jackson v. Esty*, 7 *Wend*. 148. *Leland v. Bennett*, 5 *Hill*, 286. *Bush v. Davison*, 16 *Wend*. 550. *Varick v. Tallman*, 2 *Barb*. 113.)

CHAPTER VIII.

OF ALIENATION OF REAL PROPERTY THROUGH THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

The right of eminent domain is defined to be the ultimate right of the sovereign power to appropriate not only the public property but the private property of all persons within the territorial sovereignty, to public purposes. (*Vattel's Law of Nations*, book 1, *ch.* 20, § 244, *approved by Story*, *J. in Charles River Bridge v. Warren Bridge*, 11 *Peters*, 641.) No civilized state can exist without

the enjoyment of this right. The various improvements which are essential to the well being and prosperity of a community rest upon it. Without it, public highways, turnpike roads, rail roads and canals, and the various public buildings which are needed for the convenience of the administration of justice, or of the public charities of the country, could not be made and preserved. If government was required, in every case, to obtain the assent of the owner of real estate, which might be wanted for any of these purposes, or for fortifications, it would be subjected to intolerable delays, and to gross and unreasonable exactions, or be obstructed altogether.

The necessity for some provision on this subject, as well for the public as for the security of individuals, was foreseen at an early day, and accordingly it was provided by the fifth amendment to the constitution of the United States, that private property shall not be taken for public use, without just compensation. This provision is supposed not to embrace cases arising under the state governments, but to be applicable solely to such as arise under the general government. (*Barron v. Mayor of Baltimore*, 7 Pet. 243. *Livingston v. Mayor of New York*, 8 Wend. 85. 2 Cowen, 818.) It assumes that government had the right already from the nature of sovereignty, and it was designed to impose the limitation of just compensation upon the exercise of the right. The constitution of this state, while it asserts the original and ultimate property in all lands within its jurisdiction, to be in the people, contains the same limitation as to the powers of the government to take private property for public use, as is contained in the amendment to the constitution of the United States, already referred to. It is in truth merely the assertion of a great principle, which governs the actions of all enlightened governments.

There never has been any doubt with respect to the exercise of the right of eminent domain in this state, when the property was to be applied for the public use, unconnected with individual profit. The taking of land without the consent of the owner, for the purpose of laying out highways, and the erection of bridges, and of gravel and other materials for their construction and reparation, was exercised as a right before the constitution was formed, and was regulated by statute. Nor was the right questioned to lay out a *private way* for an individual occupant. The necessity for the road, in all cases, had to be determined by local officers chosen by the people, and suitable provision was contained in the various stat-

utes on the subject, for making compensation to the owner for the easement thus obtained. These laws existed in the time of the colony, and have continued without interruption as to the principle involved, to the present day. (2 *Laws of N. Y.* 664, § 19, *Van Sch. ed.* *Id.* 723, § 2. 1 *Laws of N. Y.* 139, 141, §§ 2, 13, *Jones & Varick's ed.* *Laws of 1784.* 1 *Greenl.* 108, § 13. 2 *R. L. of 1813*, p. 276, § 20. 1 *R. S.* 517, §§ 77, 79. 2 *id.* 402, 403, 5th *ed.*) These laws above referred to cover the entire period from 1772 to the present day.

In the case of *Taylor v. Porter*, (4 *Hill*, 140,) it was decided by a majority of the supreme court, that the statute of 1830, authorizing a private road to be laid out over the lands of a person without his consent, is unconstitutional and void. The chief justice dissented from the decision, and supported his views by reasoning which has never been answered. The decision itself took the public by surprise, and its correctness was very generally denied. This decision was, in 1846, brought to the notice of the convention then in session to revise the constitution. (*Atlas ed.* 103.) The constitution, as adopted in that year, contains a provision that private roads may be opened in the manner to be prescribed by law, the necessity for the road and the amount of all damages to be sustained by the opening of it, being first determined by a jury of freeholders. (*Const. of 1846, Art. 1, § 7.*)

The same principle was made applicable to lands taken for turnpike roads, and the bridges connected with them. The charters of the early companies contained suitable provisions on this subject, and at length, in 1807, a general act was passed, (1 *R. L.* 231, § 3,) authorizing the company to enter upon the land for the purpose of making the road, if no person was living on the land who had authority to receive the damages; but the title to the land was not vested in the company, even for the purpose of the road, during the existence of the charter, until actual payment of the damages, and the moment the owner made proper demand of the damages, and the same were not paid, he might bring an action for the recovery of the land. (*Meserole v. The Mayor of Brooklyn*, 8 *Paige*. 198.)

A turnpike road being a substitute for the former highway, and being open for all to travel on, was deemed a public road for all purposes. It was never seriously doubted that the legislature had the power, even after the adoption of the constitution of 1821, to authorize the taking of land for a turnpike, without the consent of

the owner, on making just compensation. The constitution of 1777 did not contain the prohibition against taking private property for public use, and the clause was first inserted in the constitution of 1821, (*Art. 7, § 7,*) in the same form that it exists in the present constitution. Yet all the early charters for turnpike roads contain the authority to take land for the purpose of the road, on making just compensation. The fact that individual stockholders were supposed to be entitled to derive a benefit from the use of the road in the shape of tolls, did not derogate from the principle that the purpose to which the land was applied was a public purpose. These benefits were a remuneration for their capital invested in the road, which relieved the public from the expense of constructing and keeping it in repair.

After the principle forbidding private property to be taken for public use without just compensation came to be inserted in the organic law, it was insisted that the legislature could not exercise the right of *eminent domain* in favor of corporations, whether private or municipal. It was contended that the statute must designate the specific land to be taken, and that the legislature could not delegate the power to the corporation to make the location and selection. Had the objection prevailed, it is quite obvious that no rail road could have been constructed in this state, without an expenditure of money that would have rendered the franchise valueless. But the objection was overruled by the highest court of the state. It was decided that the legislature may grant to such corporation the power to appropriate private property necessary for their use, on making compensation as required by the constitution ; and that such power may be granted by a general act providing for the creation of an indefinite number of corporations. (*The Buffalo et al. Rail Road Co. v. Brainard and others*, 5 *Selden*, 100.) This subject was very fully discussed in the early case of *Bloodgood v. The Mohawk and Hudson Rail Road Co.* (18 *Wend.* 9-78.) That case was concluded by the court of errors, by the adoption of a resolution declaring, in substance, that the legislature of this state have the constitutional power to authorize the taking of private property for the purpose of making rail roads, or other public improvements of the like nature; whether such improvements be made by the state itself, or through the medium of a corporation, or joint stock

company, on making ample provision for a just compensation for the property taken to the owners thereof.

The same doctrine has been applied, by the highest court of the state, to *municipal* corporations. Thus, it was decided in *Heyward v. The Mayor &c. of New York*, (3 *Selden*, 214,) that the legislature has the power to authorize a municipal corporation to acquire a fee simple to lands of private persons required for public purposes, upon the payment of a just compensation, and when so acquired, no reversionary estate remains; and if the public exigencies require the conversion to some other purpose they may be so converted.

The right of *eminent domain* does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. But if the public interest will be in any way promoted by the taking of private property, it rests in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*. (*Beekman v. Saratoga and Sch. Rail Road Co.* 3 *Paige*, 73.) No just sovereign would take the property of the subject, for the public use, without his consent, unless a fair equivalent was returned. The question under our constitution is whether the payment of the compensation should precede the taking of the private property for public use, or be concurrent with such taking; or whether it is enough that provision be made for its *certain payment*. In the case of *Rogers v. Bradshaw*, (20 *John*. 735,) the court of errors decided that where private property was taken for public use, it was not necessary that the amount of compensation should be actually ascertained and paid before the appropriation; but that it was sufficient if a certain and adequate remedy was provided, by which the individual could obtain such compensation without unreasonable delay. This principle was approved in the later case of *Bloodgood v. Mohawk and Hudson R. R. Co.* (18 *Wend*. 17.)

It is the better opinion that an act authorizing the taking of private property for public use is not valid, unless it or some other act contains a suitable and efficient remedy for such compensation. It is not enough to cast the party, whose property is thus taken, upon the doubtful and feeble remedy arising from the moral duty

of the legislature to make it. The legislature may authorize an entry on the lands of a person for the purpose of examination, without previous payment; but that is a different thing from an *appropriation* of the land to the public, divesting the title of the owner. (*See Bloodgood v. M. and H. R. R. supra; Jerome v. Ross*, 7 *John. Ch.* 344; 2 *Kent's Com.* 339, *note.*)

It would seem, on principle, that when the parties cannot agree, that a regular appraisal of the damages, followed up by payment or its equivalent, a tender, where acceptance of the sum awarded has been declined, is essential to divest the owner, and to vest the title in the corporation. (*Wheeler v. The Rochester and S. R. R.* 12 *Barb.* 227.)

The title acquired by a corporation for lands necessary for a rail road, is an estate in fee simple, whether the corporation be in terms unlimited in its duration, or confined to a definite period. It may receive a less estate by grant, if it be so stipulated in the deed; but a corporation, although created but for a limited period, may acquire the fee simple to lands necessary for its use. (*Nicoll v. The N. Y. and Erie R. R. Co.* 2 *Kern.* 121. *The People v. Mauran*, 5 *Den.* 389.) Such a corporation has a fee simple for the purpose of alienation, but a determinable fee for the purpose of enjoyment.

Although the lands be thus compulsorily obtained, yet where the title has vested in the corporation by the payment of the just compensation, all the incidents of ownership follow. Should the exigences of the company make it necessary, they may alien such lands in fee simple. In the case of the Almshouse in New York, it had been used for twenty-seven years, and was then moved to another site, and yet the title to the original site was not thereby lost. (*Heyward v. The Mayor &c. of N. Y.* 3 *Seld.* 214.)

The statutes of this state make ample provision for the case of persons laboring under the disability of infancy, idiocy, insanity, &c., when it is necessary to take their lands for the purpose of a rail road; and also for the case of non-residents. But the further consideration of this branch of the subject does not belong to this work. (*Laws of 1850*, pp. 216, 217. *Id. of 1854*, ch. 282, p. 608 *et seq.*)

If the title be acquired by an amicable agreement between the parties, the deed will be in the form of other deeds to a corporation; and it will carry the fee without words of limitation. (*Nicoll v. N. Y. and Erie R. R. supra.*) If, however, it be acquired by

the exercise of the right of eminent domain, the proceedings should be set forth at large, showing jurisdiction in the officer, and the mode in which it was exercised. (*See the form of a record of an assessment of damages in Adams v. Saratoga and Washington R. R. Co.* 11 Barb. 414-417 *et seq.*, and remarks by Willard, J. in that case; and the remarks of the judge in *Buell v. The Trustees of the Village of Lockport*, 4 Seld. 58; *Dyckman v. The Mayor of N. York*, 1 *id.* 434, and remarks of Foote, J. in that case, page 440.) [See Appendix.]

CHAPTER IX.

OF THE ALIENATION OF REAL ESTATE BY DEVISE.

SECTION I.

Of the Nature of a Devise.

The mode of alienation, of which we have been treating heretofore, in cases where it was made by the parties possessing the title at the time, in general, assumes that the instrument of conveyance will take effect during the life of the grantor. A devise, on the contrary, is a disposition of real property in a person's last will and testament, to take effect on the death of the deviser.

The law has not prescribed any particular *form* in which a devise must be framed. It must be in writing, and must indicate the intention of the testator to dispose of his lands after his decease. No entry is required by the devisee to render the transfer of the fee effectual. The devise interrupts the descent of the land to the heir; and the devisee may bring an action against the heir to recover the estate devised, before the will has been admitted to probate. The title of the devisee is derived from the will, and not from the decree of the surrogate's court. A will of freehold lands need not be proved before the surrogate, in order to perfect the title of the devisee; though it is usual, and always recommended, that a will merely disposing of real estate, should be proved and recorded according to the provisions of the revised statutes. This is important not only to perpetuate the evidence of the due execution of the will, but to defeat any conveyance that might be made

by the heir after the death of the testator, to a party purchasing in good faith, without knowledge of the will. Unless the will is proved and recorded in the proper court within four years after the death of the testator, in the manner prescribed by the act, the title of a purchaser in good faith, and for a valuable consideration, from the heirs, will prevail over that of the devisee. (2 R. S. 749, § 3.)

In a contest between the devisee and the heir, the probate copy of the will is not necessary to be produced; nor is it evidence, unless it has been proved before the surrogate as a will of real estate, on the requisite citation to the heirs. It is otherwise with respect to a will of personal property. The probate of a will of personal property, whether obtained by a summary or a plenary proceeding, if granted by the proper court, is conclusive evidence of the due execution of the will and of the testamentary capacity of the testator. (*Bogardus v Clark*, 4 Paige, 623. *Muir v. The Trustees of the Orphan Asylum*, 3 Barb. Ch. 477. *Cotton v. Ross*, 2 Paige, 396. *Vanderpoel v. Van Valkenburgh*, 2 Seld. 190.)

A court of equity frequently decides upon the validity of a will of real estate, when the question comes before it collaterally; but if the heir insists upon the invalidity of the will in his answer, an issue is awarded to try the question at law. It was well settled under the former practice of the court, and the principle still remains sound, that the heir cannot go into equity to set aside a will on the ground of the incompetency of the testator, if the defendant makes the objection in due time. (*Cotton v. Ross*, *supra*.) The validity of the will, and every question affecting capacity, are directly involved in an action by the devisee to recover the estate devised to him, whether the action be against the heir or any other person. Those questions may be discussed in an action before the proper court to prove the will as a will of real estate, as will be shown more fully in a subsequent section.

A will of immovable property, that is, a *devise*, is in general governed by the *lex rei sitæ*. The law of the place where such property is located, by the rules of the common law, governs as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities necessary to give the will effect. (1 *Jarman on Wills*, 1. *Story on Conflict of Laws*, § 474. *Holmes v. Remsen*, 4 John. Ch. 460; *S. C.* 20 John. 229. *McCormick v. Sullivan*, 10 Wheat. 192. *U. States*

v. *Crosby*, 7 *Cranch*, 115. *Clark v. Graham*, 6 *Wheaton* 577. *Kerr v. Devisees of Moon*, 9 *id.* 565.) In some of the states it is understood there are statutes changing the above rule, but in this state the doctrine of the common law prevails.

If the property disposed of by the will be personal, or rather movable property, the *lex domicilii* prevails. The cases before cited show that with respect to a bequest of personal property, or the succession to it on the death of the intestate, the law of the domicile of the testator or intestate controls. This appears to be the general rule in all civilized countries, and may be said to be a part of the *jus gentium*. (*Ennis v. Smith*, 14 *How. U. S. Rep.* 400.)

The presumption of law is that the domicile of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicile of choice, the burden of disproving it. The place of residence must be taken to be the domicile of choice, unless it is proved that it was not meant to be a principal and permanent residence. (*Id.* 421 *et seq.*)

The question of domicile is much more a question of fact than of law. It depends on *intention*, and on the *fact* of actual residence. *Intention* alone will not work a change of domicile; nor will the removal of a person from one place to another, for temporary purposes, and with no intention to break up the original domicile. The original domicile remains until another has been acquired. (*See Bempde v. Johnstone*, 3 *Vesey*, 201. *Munroe v. Douglass*, 5 *Mad.* 379.)

SECTION II.

Of the Parties to a Devise.

To enable a party to devise his real estate he must be of sound mind, and not labor under any disability, as infancy or coverture; and the party to whom the estate is devised must be capable of taking by that form of alienation. This matter is in this state regulated by statute. It is enacted that all persons except idiots, persons of unsound mind, married women and infants, may devise their real estate by a last will and testament, duly executed according to the provisions of law. (2 *R. S.* 56.)

The first two grounds of disability embrace every case of testamentary incapacity, such as idiocy, lunacy or unsoundness of mind,

whether caused by old age or other infirmity. This branch of the subject belongs to works on the probate of wills in the surrogates' courts, and is fully discussed in *Willard on Executors*, 66 *et seq.* to which, and the cases there cited, the reader is referred. The presumption of law is that every person possesses the requisite capacity unless the contrary appears. The onus is cast upon the party who impeaches the will, to make out the fact of incapacity. All persons except those laboring under one or more of the disabilities referred to are expressly empowered to make a will.

The statute which authorizes the father to dispose of the custody and tuition of his infant child during its minority, is not confined to such father as is of full age, but is expressly extended to a father who is a minor. This disposition is to be by deed or last will, and as a male must be of the age of eighteen years or upwards, in order to make a valid will of personal estate, he cannot make a testamentary appointment of a guardian under that age. (2 *R. S.* 60, 150. *Willard on Executors*, 453.)

The disability of coverture, which was general in 1830 when the statutes were revised, has been in a great measure removed by subsequent statutes. The act of 1849, to amend the act for the more effectual protection of the property of married women, (*Laws of 1849*, p. 528,) permits a married woman to take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and *devise* real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried. And such real estate is not subject to the disposal of the husband, nor is it liable for his debts. The will of a feme covert, made in pursuance of the above statute, like a will made in pursuance of a power, should be admitted to probate in the court of the proper surrogate. (*Waters v. Cullen*, 2 *Bradf.* 354. *Van Wert v. Benedict*, *Id.* 114.) In one of the above cases, the surrogate of New York treated the act of 1849 as a substantial repeal of the restriction contained in the revised statutes against the validity of a will made by a married woman in regard to real and personal property. He considered it as removing the personal disability, and did not think it was limited to subsequently acquired property. Be this as it may, the statute of 1860, ch. 90, is in terms made applicable not only to such property as the married woman owns as her sole and separate property; to that

which comes to her by descent, devise, bequest, gift or grant; to that which she acquires by her trade, business, labor or services carried on or performed on her sole or separate account; but also to that which a married woman in this state owns *at the time of her marriage*. It declares that it shall be and remain her sole and separate property, and may be used, collected and invested by her in her own name; and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for her support of herself or her children, by her as his agent.

We have seen, in a former part of this treatise, that with respect to her real estate, a married woman may convey it by deed in all respects as if she were sole and unmarried. It follows, by parity of reasoning, that she may devise it in the same manner. Her will is subject to all the incidents of that of a single woman. If proved before the surrogate, the citation should go to her heirs, which in this case embraces her late husband, who, in certain cases, succeeds to her estate as heir. (*L. of 1860, p. 159, § 11.*)

In considering who are capable of being devisees, under a will of real estate, the subject naturally divides itself into two branches: 1, with regard to *natural* persons; and 2, with regard to *corporations*.

1. All *natural persons* who are, at the time when a will is made, capable of acquiring lands by purchase, such as infants &c. may be devisees. Under this rule *posthumous* children are embraced. The revised statutes permit them to inherit, when no provision is made for them, or they are not mentioned in the will; and thus by direct implication allow them to be devisees. (2 *R. S.* 65, § 49. *Mitchell v. Blair*, 5 *Paige*, 588.)

A *married woman* may take by devise from her husband; for it does not take effect till his death. Of course she may take from any other person. The same is true of persons laboring under the disability of idiocy, lunacy, &c.

An *illegitimate* may take by devise, whether he is *in esse* and has acquired a name or not; if he be so described as to remove all uncertainty as to the person intended. It was at one time supposed that a bastard in *ventre matris* was incapable of being a devisee, and, therefore, that such a devise was void. (*Co. Litt.* 3 *b.*) The reason, assigned by Coke, was that he must have gotten a name by

reputation before he could be the grantee, and, of course, the devisee of an estate. But the object of a name is to identify the person, and this surely can be done by describing the mother. A will in favor of natural children is to receive a like construction as those in favor of other persons. Although a devise to children, without other description, means legitimate children, yet if the testator had no legitimate children, and had those who were illegitimate, and who were recognized as his, they will be entitled to take. (*Gardner v. Heyer*, 2 *Paige*, 11.)

The rule of law does not acknowledge a natural child to have any father before its birth. A devise by a man *to such child or children as A. may happen to be enciente by me*, is void for uncertainty. But a devise to a child or children, of which a particular woman was *enciente*, without reference to any person as its father, would be free from uncertainty, and probably good. (*East v. Wilson*, 17 *Ves.* 531.)

2. *Corporations.* The revised statutes expressly provide that no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute, to take by devise. (2 *R. S.* 57, § 3. *The Theological Seminary of Auburn v. Childs*, 4 *Paige*, 422. *King v. Rundle*, 15 *Barb.* 139.) The act in relation to religious incorporations allows those bodies to take and hold real estate by grant or devise; and the only restriction is as to the amount of the lands which they are entitled to hold. (3 *R. S.* 295, § 4, 1st ed.) It is under this general act that most of the religious societies in this state have been incorporated. They have an unlimited power to receive property up to a certain amount, but their power of alienation of their realty requires for its validity the action of the supreme court or county court.

The corporations formed under the general act of April 12, 1848, for the incorporation of benevolent, charitable societies, and missionary societies, and the several amendatory acts, (*L. of* 1848, p. 447, § 6. *Id. of* 1849, p. 400. *Id. of* 1857, p. 615,) although made capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will and testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars, are expressly subject to the proviso, that no person leaving a wife or child or parent, shall devise or bequeath to such institu-

tion or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth; and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator. This disabling clause is founded on the principle that the claim of creditors, and of wife, child and parent is stronger than that of benevolence, and should be satisfied before the testator should dispose of his property for pious uses. The limitation too, that the devise or bequest should be made at least two months before the testator's death, is not without its value. The motive doubtless is to insure the making of the devise or bequest with reasonable deliberation, without yielding to an importunity which some minds cannot resist in the closing period of life.

It is the policy of the laws of this state, that the various religious denominations should become incorporated under the general statute for that purpose. The temporalities of the church, in that case, become vested in the trustees, the whole, or major part of whom, are laymen, and are not exclusively under ecclesiastical control. The act of 1855, entitled "An act in relation to conveyances and devises of personal and real estate for religious purposes," (*L. of 1855, ch. 230, p. 338; 3 R. S. 621, 5th ed.*) was enacted to carry out these views. It has been adverted to in former parts of this treatise. It enacts that no grant, conveyance, *devise* or lease, of personal or real estate to, nor any trust of such personal or real estate, for the benefit of any person and his successor or successors in any ecclesiastical office, shall vest any estate or interest in such person, or in his successor; and no such grant, conveyance, *devise* or lease, to or for any such person, by the designation of any such office, shall vest any estate or interest in any successor of such person. And without admitting the validity of any such grant, conveyance, devise or lease theretofore made, it enacts that no future grant, conveyance, *devise* or lease of any real estate, consecrated, dedicated or appropriated, or intended to be consecrated, dedicated or appropriated to the purposes of religious worship, for the use of any congregation or society, shall vest any right, title or interest in any person or persons to whom such grant, conveyance, *devise* or lease may be made, unless the same shall be made to a corporation organized according to the provisions of the laws of this state, under the act entitled "An act to provide for the incorporation of religious

societies," and the acts amendatory thereof, or under the act entitled "An act for the incorporation of societies to establish free churches," passed April 13, 1854. (*L. of 1854, ch. 218. 2 R. S. 620, 5th ed.*) Subsequent sections provide for the escheat of such real estate to the people of this state, in the event that such congregation or society shall not be incorporated as aforesaid, and for placing it under the charge of the commissioners of the land office of the state, who are required, on being satisfied that the congregation or society which had used, occupied or enjoyed such real estate for the purposes of religious worship prior to the death of the person or persons on whose decease the title thereto vested in this state, has been duly incorporated, to grant and convey such real estate to said corporation.

The occasion which led to the foregoing acts was the refusal of the Roman Catholics to become incorporated under the general law; and their practice of vesting the title of their real estate dedicated to the purposes of religious worship in ecclesiastics. That policy was deemed incompatible with our institutions, as it gave an undue control to those persons over the laity of their congregations.

If a devise be made to the heirs of the testator of the precise estate which they would take by descent, the devise is void, and the heirs take by descent, which is the better title. This was the rule by the common law; but it was changed by the English statute of 3 and 4 Will. 4th, ch. 106, § 3, which requires in such a case that the heir shall take as a devisee, and not by descent. (1 *Jarman on Wills*, 111, *Perkins' ed.*) But the rule has not been altered by the law of this state. (*Van Kleeck v. Dutch Church*, 20 *Wend.* 469.)

With regard to the *alienage* of the devisee, it was enacted by the revised statutes, that every devise of any interest in real property to a person who, *at the time of the death of the testator*, shall be an alien, not authorized by statute to hold real estate, shall be void. The interest so devised descends to the heirs of the testator; if there be no such heirs competent to take, it passes under his will to the residuary devisees therein named, if any there be competent to take such interest. (2 *R. S.* 57, § 4.) But this statute was modified in 1845 (*L. of 1845, ch. 115*) in favor of such *resident* aliens as have made and filed in the office of the secretary of state the deposition in writing required by 1 *R. S.* 720, § 15, that he is a resident of this state, and intends always to reside in the United States and

to become a citizen thereof, as soon as he can be naturalized, and that he had taken such incipient measures as the laws of the United States require to enable him to obtain naturalization. An alien having thus complied with the law, may take by grant or *devise*, and may also grant and devise his own real estate.

The court of appeals held in *Wadsworth v. Wadsworth*, (2 *Kernan*, 376,) that the foregoing provision of the revised statutes did not apply to an alien devisee, born *after* the death of the testator. Such a person could take real estate by devise, though he could not hold it against the state. In that case the testator devised lands in trust for the use of his daughter, who was an American citizen, during her life, with remainder in fee to her issue, and she subsequently died leaving an alien son, born *after the death* of the testator; the court held that he took under the will as against the heirs of the testator.

The authorities which establish the common law rule, that an alien may take by *devise*, and hold against all but the state until office found, are, among others, *Doe v. Robertson*, (11 *Wheat.* 332;) *Fairfax v. Hunter*, (7 *Cranch*, 603.)

The act of 1845 enables the alien to anticipate the benefits of our naturalization laws, and it has a benign tendency to induce those who intend to take their lot in this country, to become citizens as soon as the laws will permit.

SECTION III.

Of the proper subject of a Devise.

The proper subject of a devise is real estate. It matters not whether it be in possession, or remainder, or reversion; it is in either case the subject of devise. Every estate and interest in real property, descendible to heirs, may be so devised. (2 *R. S.* 57, § 2.)

By the rules of the common law, a testator could not devise lands subsequently acquired, however strongly his intention to that effect might be expressed. (*Bunter v. Coke*, 1 *Salk.* 237.) The English statute (1 *Vict. ch.* 26, § 24,) has changed the rule of law upon this subject entirely, and provided that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator; unless a contrary intention shall appear in the will. (*See* 1 *Will. Ex. Preface*, p. 16.) The revised stat-

utes have not gone so far as to put wills of real estate upon the same footing as wills of personal property, in this respect; though they have unquestionably abrogated the technical rule that the testator was incapable of devising an interest in land, or real estate, acquired subsequent to the date of the will by which he attempted to dispose of the same. (*Pond v. Bergh*, 10 *Paige*, 149. *Parker v. Bogardus*, 1 *Seld.* 309.) The 5th section of the title relative to wills of real and personal property, (2 *R. S.* 57,) declares that every will that shall be made by a testator in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. This statutory provision proceeds upon the ground that in a *general* devise of all his real estate, the testator has reference to the real estate as it shall exist at the time of his death; and that such a construction of the testamentary disposition of his property will be but carrying his intention into effect. Upon the same principle, said the chancellor in *Pond v. Bergh*, (*supra*,) if he devises all the real estate of a particular description of which he shall die possessed, or which shall belong to him in a *particular town or county*, at the time of his death, although the devise would not be within the words of this section, it not being a general devise of all his real estate, it would clearly be within the spirit and intent of the act. But where he devises all his real estate at a particular place, or within a particular district of country, there is good reason to suppose he means to speak in reference to the lands he has acquired there; and that if he intended to give to the devisee all the lands or real estate which he should afterwards purchase at that place, or within the specified district of country, there would have been something in his will indicating such an intention.

The provisions of the statute do not apply to wills executed prior to 1830, when the revision took effect. In this respect, the effect of wills executed prior to that time, is not touched by the statute, but remains as at common law. (*Parker v. Bogardus*, 1 *Seld.* 309. *Ellison v. Miller*, 11 *Barb.* 332.)

In order to devise real estate, a man must be the beneficial owner. We have seen elsewhere that he cannot alienate, and of course cannot devise real estate held by him in *trust*. In such a case, on the death of an only trustee, the trust vests in the supreme court, which is authorized to appoint a new trustee; and thus the trust is pre-

served until the purpose for which it was created is satisfied. (1 *R. S.* 730, §§ 67, 68, 71. *In the matter of Van Schoonhoven*, 5 *Paige*, 559. *Hawley v. Ross*, 7 *id.* 103.)

Chattels real, or terms for years, cannot be *devised*, though, like other personal property, they can be *bequeathed*, and thus disposed of by will. If not so disposed of, they vest in the executor or administrator, as assets, and do not descend to the heirs. They are to be inserted in the inventory as part of the personal property of the deceased. (2 *R. S.* 82.)

A party who has entered into a valid *executory* contract to purchase real estate, has such an interest even before the legal title is conveyed to him, that he may devise the same. This is an equitable interest which a court of equity will protect.

From the time when the agreement was executed, the vendor is considered to be seised only in trust for the purchaser, who in equity is treated as the real owner. The latter, therefore, can devise the land, but the former cannot. The language of our statute is broad enough to include this, as a devisable interest. Equity goes upon the maxim that what is agreed to be done is treated as actually performed.

A *possibility* coupled with an interest is devisable, when the person in whom the interest is to vest in the event contemplated, is known or is capable of being ascertained. As to such interest, it is held that *devisable* and *descendible* are convertible terms; and no particular form of words is necessary in a will to embrace contingent interests in real estate. (*Pond v. Bergh*, *supra*.)

It is no objection to the right of devising property that it is held by a stranger adversely; and it is strongly intimated that under our statute of wills, a devise may be good notwithstanding an actual disseisin. The statute against champerty and maintenance does not apply to devises, nor to judicial sales or assignments under our insolvent laws. (*Varick v. Jackson*. 2 *Wend.* 166.)

We have few cases of joint tenancy in this state, as the law favors a tenancy in common. But where an estate is held by two or more in joint tenancy, none but the last survivor can devise it. A different rule would defeat the right of survivorship, which is an inseparable incident of the estate. The reason assigned by Coke is, that the survivor has a priority of time in the instant, and therefore is preferred to the devisee of the deceased. (*Litt.* § 287. *Co. Litt.* 185 b.)

A *mortgage* is considered as a mere security for the payment of the debt. The debt is the principal and the mortgage the incident. Formerly, on the death of the mortgagor, the personal representatives, as between them and the heirs, were bound to relieve the inheritance from the incumbrance. This was changed by the revised statutes; and now, whenever real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee is required to satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of the ancestor, unless there be an express direction in the will of the testator, that such mortgage be otherwise paid. (1 R. S. 749, § 4. *Mollan v. Griffiths*, 3 Paige, 404. *House v. House*, 10 id. 162. *Johnson v. Corbett*, 11 id. 269. *Taylor v. Wendel*, 4 Bradf. 324.)

Until foreclosure, the legal estate is in the mortgagor, and he may devise the premises in the same manner as if they were unincumbered. But the mortgagee has no estate in the land which will pass to his heirs, or can be devised as real property, even after breach of the condition, until foreclosure.

A *rent charge* is devisable, and may be severed from the inheritance. By the devise of the reversion the rent will pass, unless some provision be made to the contrary. But by a devise of the rent alone, the reversion will not pass. (*Demarest v. Willard*, 8 Cowen, 206.)

SECTION IV.

Of the Formalities necessary to a Valid Devise.

There was formerly a marked distinction between a will devising real estate, and a will which merely disposed of personal property. This distinction applied not only to the solemnities attending the execution of the instrument, but also to the capacity of the testator, and the necessity and mode of probate. These distinctions have, in a great measure, been abrogated in this state. The only difference between the two cases now is, that it is essential to the making of a will of real estate that the testator should be of the full age of twenty-one years, whereas a male infant of the age of eighteen years or upwards, and an unmarried female infant of the age of sixteen years or upwards, if laboring under no other disability,

may, in either case, bequeath their personal estate by will in writing. (2 *R. S.* 57, 60.)

The probate of wills and the proving and recording wills of real estate belong to the courts of the surrogates of the several counties, and are sufficiently treated in books devoted to that subject.

It is not necessary to the validity of a devise, that the will should have been admitted to probate as a will of personal property; or that it should have been recorded as a will of real estate, under the provisions of the revised statutes. We have seen elsewhere, that it is desirable that it should be proved in the proper court as a matter of prudent precaution and to preserve the evidence of its authenticity, but that the devisee does not derive his title from the probate, as the party claiming a personal bequest does to a certain extent.

The devisee may, without the proof of the will before the surrogate, enter upon the land devised to him, or maintain an action at law for its recovery, if it be in the possession of a stranger, at the death of the testator, or at any other time. It hence becomes necessary to know the requisite proof to sustain a title under a will; and that in a great measure depends on the statutory requirements as to the execution of it.

The general provisions with respect to the execution of a will of real estate are the same as those which are required in a will of personal property, and are prescribed by the statute. (2 *R. S.* 63, § 40.) It is required that a last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator. (2 *R. S.* 63, § 40; 68, § 71, *as to codicil.*)

The four ingredients above specified must enter into, and together constitute one entire complex substance essential to a complete execution. (*Per Nelson, J. in Remsen v. Brinkerhoof*, 26 *Wend.* 331.)

Before noticing more at large the above four requisites, it is proper to say that the will must be in *writing*. The statute has not declared on what substance it should be written, nor whether with pen and ink, or with a lead pencil. It is invariably, in this state, written on paper or parchment, and with pen and ink; and that is recommended as the most advisable course. In England, wills of personal property written with a pencil have been admitted to probate. (*Rymer v. Clarkson*, 1 *Phill.* 35. *Dickerson v. Dickerson*, 2 *id.* 173.) The question has not arisen in this state since the revised statutes. We have seen that it is essential to the validity of a deed that it should be written on paper or parchment. This was founded on technical reasons applicable to common law proceedings, and does not necessarily relate to wills, the proof of which belonged to a different forum. But in this state, wills of real and personal property are both placed on the same footing, and are required to be in writing, and subscribed by the testator at the end thereof, and to be attested by at least two witnesses, who are to sign their names at the end of the will as such witnesses. It was obviously the design of the legislature, at the revision, to assimilate the different modes of conveyance to each other. There is a strong implication, from the language of the statute, that the will should be written with pen and ink. The decision of the court of errors in *Davis v. Shields*, (26 *Wend.* 341,) which arose under similar language in the statute of frauds, to that in the act concerning wills, affords a strong argument in favor of the doctrine that a testamentary instrument must be written on paper or parchment, with pen and ink. Professor Greenleaf, the learned editor of Cruise's Digest, seems to think that it is not indispensable to the validity of a will, that it should be written on paper or parchment, or with pen and ink; and that the substance on which it is written or the mode of writing is not conclusive as to the intention. (3 *Cruise's Dig.* 45, note 2, *Greenl. ed. tit.* 38, *Devise, ch.* 5, § 4.) The learned professor does not speak with reference to the laws of this state, but the common law. (See also *Green v. Skipworth*, 1 *Phill.* 53.)

It is not material in what language the will is written, nor in what handwriting, or character, so that it be fair and legible, and the meaning sufficiently apparent. Nor is it important whether numbers, or sums of money, be expressed in words at length, or in figures; nor whether abbreviations be used, provided they are such as are usual and well understood. Nor is it necessary, absolutely,

that the rules with respect to capitalizing and punctuation should be strictly observed. These are matters which a skillful draftsman will never disregard, as a correct observance of good usage in this respect tends to avoid ambiguity and uncertainty; and thus to relieve the parties interested from distressing and expensive litigation.

Thus much has been deemed necessary to say on the subject of the writing of a will, and the materials with which it should be done. It is now proposed to notice the four requisites particularly specified in the statute. Experience has shown that it is impossible to announce the directions of the lawgiver in a few brief sentences, so accurately expressed, as to avoid all room for construction. The imperfection of human language frequently calls for circumlocution to free it from doubt and uncertainty.

The *first* requisite, that of *subscribing by the testator at the end of the will*, was a change from the former law, which required only the *signing* of the will by the testator. (1 R. L. 364.) Under that law it had been held that if the testator wrote his name in any part of the will, with the intent to give it validity, it was a sufficient signing within the meaning of the statute; and that making his mark with the like intent, was a valid signing. (*Jackson v. Van Dusen*, 5 John. 144. *Baker v. Dunning*, 8 Adol. & Ell. 94. *Tonnele v. Hall*, 4 Comst. 145, per Jewett, J. 1 Jarm. on Wills, Perkins' ed. 114, and notes.)

The mischief under the old law was, as stated by Jewett, J., supra, that inasmuch as the testator was not required to sign the will at the end of it, it could not always appear clearly that he had perfected the instrument. To remedy this, our statute requires the will to be *subscribed* by the testator at the end of the will. The late English statute, Victoria 1, chap. 26, passed in 1837, has adopted a similar change, by requiring the will to be "signed at the foot or end of the will." The word "*subscribe*" imports a signing beneath the matter written, and this is made more plain by adding, "at the end of the will." A will commencing with the name of the testator, as "I A. B. make this my last will and testament," which was held to be a sufficient signing within the old law, would not be a *subscribing* of his name at the end of the will, within the meaning of the present statute.

The statute does not require that a testator who cannot write should make his mark. It however evidently implies that a person who cannot write his own name, whatever be the cause of the omis-

sion, may make a will : that in such a case some other person may, by the direction of the testator, sign the testator's name to the will. But in this case, the person who thus signs the testator's name to the will, is required "to write" his own name "*as a witness to the will.*" (2 R. S. 64, § 41.) The former practice of making his mark should be followed when the testator fails to subscribe his name personally. For though such mark cannot perhaps be proved by persons who had seen the testator make his mark to other writings, the making of the mark is calculated to impress itself upon the mind of the witnesses, and to call the attention of the testator more strongly to the act of execution of the instrument. (*Keeney v. Whitmarsh*, 16 Barb. 141. *Butler v. Benson*, 1 id. 527. *Chaffee v. The Baptist Miss. Con.* 10 Paige, 91. *Addy v. Grix*, 8 Vesey, 504. *Jackson v. Van Dusen*, *supra*.)

The second requirement is that the subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

This acknowledgment by the testator is an independent requisite, and is not to be confounded with the declaration required by the next subdivision, that the instrument so subscribed is his last will and testament. (*Lewis v. Lewis*, 1 Kern. 220.) The acknowledgment of the testator that the instrument is his last will and testament, and requesting the witnesses to attest it as such, is not a substitute for the acknowledgment of his subscription. All the statutory requirements must be fully complied with. (*Remsen v. Brinkerhoff*, 26 Wend. 331. *Chaffee v. The Baptist Miss. Con.* 10 Paige, 85.)

The execution of the will by the testator, and the attestation by the subscribing witnesses, are all concurrent acts, and to be done at the same time. The particular order in which these requirements are fulfilled, is not important. There is necessarily some interval between the different acts, though all, in contemplation of law, are done at the same time. (*Doe v. Roe*, 2 Barb. 205. *Seguine v. Seguine*, id. 394-5, per *Edmonds, J.* *Keeney v. Whitmarsh*, 16 id. 145.)

It was intimated by the learned judge in *Butler v. Benson*, (*supra*), that the acknowledgment may be made to the witnesses separately, or that he may subscribe and publish in the presence of one, and acknowledge and publish before another. This was not a

necessary point in that case, and, though entitled to much respect, cannot be supported.

The usual mode of making the acknowledgment is by a declaration to the witnesses that the subscription is his. It has been held, in England, that when the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature. (*Gage v. Gage*, 3 *Curteis*, 451.) The cases in this state are as full and explicit. (*Nipper v. Groesbeck*, 22 *Barb.* 670.) It is well settled in the foregoing cases that no particular form of words is necessary to be used by the testator, either under the second or third requirement of the statute. The only important thing is that the testator and the witnesses alike understand that the testator's object is to give effect to the instrument as his will.

The *third* requirement is, that *the testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.*

The testamentary declaration required by this branch of the statute is deemed of great importance; and the courts have held the parties to a strict compliance with it. If it is strictly followed it will show, beyond controversy, that the testator comprehended the act which he was doing. In *Lewis v. Lewis*, (1 *Kern.* 220,) the testator presented the instrument to the witnesses and said, "I declare the within to be my free will and deed." This was held by the court of appeals not to be a sufficient declaration that the instrument was his last will and testament. In this case it was left in doubt, by the mode of expression, whether the testator supposed he was executing a will or a deed. The statute does not use the word *publication*. It is doubtless included in the word "*executed*," in connection with the testamentary declaration. (*Brinkerhoff v. Remsen*, 8 *Paige*, 488. *S. C. in error*, 26 *Wend.* 325.) The declaration required by the statute must be made in the presence of two witnesses at the least. It is not enough that the testator makes the requisite declaration in presence of one witness, and afterwards signs the instrument in the presence of two who subscribe it as witnesses at his request. (*Seymour v. Van Wyck*, 2 *Seld.* 120.)

When the drafting and execution of a will devising real estate

are superintended by a professional adviser, he will doubtless follow the order prescribed in the statute, as the best mode of complying with its directions and spirit. But wills are not always, and perhaps not often, prepared and executed by the aid of wise and skillful counsel. The statute is not to be construed strictly, except as to the evils it was intended to prevent; in all other respects it is to be construed liberally, and when the essential requisites are satisfactorily proved, the objects of the law are answered. The statute does not render a will invalid because the literal order in the performance of the statutory requirements has not been followed. When it is required that the testamentary declaration shall be made at the time of the subscription, time is used in the sense of *occasion*, *season*, and not in its extreme strictness, as indicative of a precise instant. (*Rieben v. Hicks*, 3 *Bradf.* 353.) It is not required that while the testator is subscribing his name, he should make the declaration. It may be done immediately preceding, or immediately after the subscription. It is enough if the various acts be so connected as to leave no doubt that they are all parts of the *res gestæ*.

Nor is the *form* of much importance, provided the ideas be properly expressed. It is often done by means of questions put by the counsel attending the execution of the will, and the affirmative response of the testator. (*Tunison v. Tunison*, 4 *Bradf.* 138.) It is not to be expected that even intelligent laymen can perform, without advice and assistance, the ceremonies requisite to a valid execution of a will; much less can this be required from the unlearned, who are often in the last stages of disease when the act is to be performed.

It is advisable that the attestation clause of the will should be so drawn up as to indicate a compliance with the statute requirements. This should be read aloud to the witnesses in the presence of the testator. It will serve to fix their attention to the facts which have occurred, and impress them upon their memory. (*Whitbeck v. Patterson*, 10 *Barb.* 608.) An attestation clause is not absolutely required by the statute, nor is the reading of it made indispensable. It is merely recommended as a matter of caution.

In the English books, it is sometimes said that a devise must be *published*, (*Cruise's Dig. tit. 38, ch. 5, Devise*, § 50,) and that a delivery of a will as a deed is a sufficient publication. An act of publication is, however, not essential, unless when it is required by

statute, or by the power under which it is made. (*Moodie v. Reid*, 7 Taunt. 355.) We have seen that a *publication*, by that name, is not required under our statute. The *execution* of the instrument, in the manner prescribed by law, accompanied by the testamentary declaration prescribed, and the attestation of the witnesses, are in truth a publication, in the sense in which that term is usually understood. No publication distinct from the foregoing was ever required under the statute of frauds. (*Doe v. Purdett*, 4 Adol. & Ellis, 14.)

The *fourth* and last requirement is, that *there shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator*. The former statute of wills, (1 R. L. 364,) like the English statute of Henry 8th, from which it was principally taken, required that a will devising real estate should be in writing, and signed by the party making it, or by some other person in his presence, and by his express direction; and be attested and subscribed in the presence of the testator, by three or more credible witnesses. Witnesses were not required to a will of personalty.

The revised statutes have put both kinds of wills upon the same footing; and instead of three witnesses, have required two only, and have pointed out the manner in which they shall attest the will.

As a matter of precaution it is required that the witnesses shall write opposite to their names their respective places of residence; and the person who shall sign the testator's name to any will by his direction, is required to write his own name as a witness to the will. A failure to comply with either of these provisions subjects the defaulting party to a penalty of fifty dollars, but does not invalidate the instrument or the attestation.

While the statute has taken for granted that there may be cases where a testator cannot subscribe his own name to the will, and has provided for that contingency, it has made no such presumption in regard to the attesting witnesses. It assumes that no one would be called to attest the execution of a will who could not write his own name. A prudent counsellor will no doubt advise the testator to request no other persons to become attesting witnesses than such as are capable of authenticating the fact by their own signature. Nevertheless, it is by the *request of the testator* that they become attesting witnesses; and it may happen that the only persons accessible for that purpose, or desired by the testator, are too illiterate or infirm to write, otherwise than by their mark. Shall their at-

testation be invalid for that cause? We have but few decisions on this point, because probably but few cases of that kind ever occur. But the weight of authority, as well as the reason of the thing and the analogy of this to other cases, lead us to believe that the attestation of a witness by making his mark to the signature of his name, put to the will at his request by another person, is a valid attestation. (*Jackson v. Van Dusen*, 5 John. 144. *Campbell v. Logan*, 2 Brad. 90. *Harrison v. Elvin*, 3 Qu. B. Rep. 117.) The only exception to this would seem to be the case of a witness who had signed the testator's name to the will at his request, who is required in such case "*to write his own name*" as a witness to the will. If he was able to sign the testator's name, he would certainly be able to *write* his own; and there is no hardship in requiring that he should do so in such a case. There is in the positive requirement in this case, an implication that in other cases the writing of the name of the witness by his own hand is not an indispensable requirement.

There are two circumstances prescribed in the statute with respect to the attestation which should be noticed. The witnesses are required to sign their names *at the end* of the will, and *at the request of the testator*.

The first of these, with reference to the *place* where the witnesses should sign their names, will not in general lead to any controversy. If the usual attestation certificate be subjoined to the will by the person who drew it, and the witnesses sign their names thereto, it will be at the end of the will; as is contemplated by the act. If there be no such certificate, and we have seen that it is not indispensable, the signature of the witnesses should be at the end of the will, as low if not lower than that of the testator; thus showing that their signatures were subsequent to that of the testator.

The former statute required that the signing by the attesting witnesses should be *in the presence of the testator*. This is omitted in the present statute, and is no longer necessary. (*Lyon v. Smith*, 11 Barb. 124, *disapproving the doctrine of Hand, J. in Butler v. Benson*, 1 Barb. 530. *Ruddon v. McDonald*, 1 Bradf. 352. 4 Kent, 515.) The late English statute, 1 Vic. ch. 26, § 9, requires the attesting witnesses *to subscribe the will in the presence of the testator*; but neither that statute or ours requires them to subscribe in the presence of each other. (1 Will. Ex. 75, 4th Am. ed.)

It is no doubt necessary that the subscribing witnesses should write their names at the time it was executed; and it is the more

prudent course to do it when both are together, and in the presence of the testator. At common law, a person who was present and saw an instrument executed, cannot make himself a good subscribing witness, by adding his name thereto at a subsequent day, without the request of the parties. (*Hollenbeck v. Fleming*, 6 Hill, 305. *Henry v. Bishop*, 2 Wend. 575. *Lyon v. Smith*, *supra*.) The cases under the former law of real and constructive presence are no longer of any importance.

The other circumstance, namely, that the witnesses must attest *at the request of the testator*, has led to some discussion in the courts. It is not material at what time the testator requests the witnesses to attest his subscription to the will, whether immediately before or immediately after such subscription, provided it be on the same occasion, and a part of the same transaction. (*Sequine v. Sequine*, 2 Barb. 386.) Nor is it important in what language the request is made; nor whether it is proved by direct evidence, or is sought to be inferred from circumstances. (*Rutherford v. Rutherford*, 2 Denio, 33.)

It often happens that the witnesses are not called upon to testify as to the execution of the will until long afterwards. It is not surprising that they should, if they are not of the legal profession, fail to recollect the occurrence or the language of the testator at the time. If the proper attestation clause be added to the will, certifying that the testator subscribed his name to the will in the presence of the witnesses, and at the same time declared it to be his last will and testament, and requested the witnesses to sign their names thereto as witnesses to the execution thereof, and certifying further that the said witnesses did accordingly, in the presence of the testator and of each other so subscribe, and specifying the day when it was done; and be subscribed by the witnesses; the latter can hardly fail to have their memory so refreshed as to be able to give the requisite evidence. When an attestation certificate in due form is read over to the testator, in the presence of the witnesses, and the will is then subscribed by the testator in their presence, and they sign their names as attesting witnesses, it affords sufficient evidence of a request by the testator that the witnesses should sign the will. At all events, it is enough to submit the case to the jury, who will be authorized to find the requisite request. (*Doe v. Roe*, 2 Barb. 200. *Rutherford v. Rutherford*, *supra*. *Remsen v. Brinkerhoff*, 26 Wend. 332. *Brinkerhoff v. Remsen*, 8 Paige, 489-499.)

The propriety of reading over the whole attestation clause at the time of the execution of the will, in the hearing of the witnesses and of the testator, is fully shown by the preceding cases. It is not necessary to read over the entire will, unless indeed the testator be blind or illiterate; in which latter cases it seems to be necessary.

In *Jauncey v. Thorn*, (2 Barb. Ch. 240,) the chancellor said that the most liberal presumptions in favor of the execution of wills are sanctioned by courts of justice, when from the lapse of time or otherwise, it might be impossible to give any positive evidence on the subject. Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who either mistakingly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact. And when any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they had attested by subscribing the will as witnesses to the execution thereof. (*Jauncey v. Thorn*, *supra*. *Nelson v. McGiffert*, 3 Barb. Ch. 158.)

Questions with regard to testamentary capacity and the competency of the subscribing witnesses belong more appropriately to courts of probate, and will be found discussed at large in treatises devoted to that subject, and the law of evidence. In this state, as wills, whether relating solely to real or to personal property, or to both, are required to be executed by the same formalities, the doctrines we have been considering apply as well to courts of common law, as to those having the exclusive jurisdiction in testamentary matters. Some of the decisions to which we have adverted were made in cases originating in courts of probate, and others in actions at common law. (*See Willard on Ex'rs*, 97 to 118, and the cases there cited.)

With regard to codicils, it is only necessary to add, that the term wills, as used in the statute, includes codicils as well as wills. (2 R. S. 68, § 71. *Seymour v. Van Wyck*, 2 Seld. 120. *Howard v. The Union Th. Sem.* 4 Sandf. S. C. R. 82.)

SECTION V.

Of the Revocation of Devises, and of Republication.

The doctrine with regard to the revocation of wills necessarily embraces all that can be said on the subject of revocation of devises. What is affirmed of the first is applicable also to the last. It is of the very essence of a will that all its provisions are under the control and direction of the testator until his death. Until that event it is said to be ambulatory. (*Dan v. Brown*, 4 Cowen, 490. *Matter of Michell*, 14 John. 324.) And the testator may revoke it in whole or in part.

A subsequent will does not revoke a prior one, unless it contains a clause of revocation, or be inconsistent with it; and if the inconsistency be only partial, it is a revocation *pro tanto* only. (*Brant v. Wilson*, 8 Cowen, 56. *Nelson v. McGiffert*, 3 Barb. Ch. 158.)

At the revision in 1830 it was supposed to be possible so to define the law with respect to revocations of wills as to leave little or nothing open to the discretion of the courts. The statute, therefore, in the first place re-enacted, with some slight changes, the old law with respect to such revocations made by the testator himself, *animo revocandi*, and in the next place provided for the cases of implied revocation occasioned by changes of the testator's social relations, or subsequent dealings with his property.

The first class of revocations is embraced in the 42d section. (2 R. S. 64.) It provides that no will in writing, except in the cases thereafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator to the fact of such injury or destruction shall be proved by at least two witnesses.

The most obvious mode of revoking a prior will is by an express clause in a subsequent will revoking all former wills. In such a

case there can be no doubt as to the intention of the testator. It is recommended to all persons engaged in the preparation of testamentary writings, to leave no doubt on this point; but if it be the intention of the testator to revoke all previous testamentary dispositions of his property, or of any of it, it is the part of wisdom so to declare in explicit terms.

It is the *intention* of the testator to revoke his will which constitutes the revocation. The mere act of canceling a will is not a revocation, unless it be done *animo revocandi*. (*Jackson v. Halloway*, 7 John. 394.) On this principle, when the testator made obliterations in his will already executed, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired; and made interlineations and corrections which could not operate from their not being attested according to law, it was held that the will remained operative as originally executed.

It requires the same mental capacity to revoke a will by cancellation, burning, &c. as it does to make a will originally. The act of cancellation must be accompanied by the intention. Both must concur. A lunatic can have no such intention. If a party is incompetent to make a will, he is incompetent to revoke it, either by a physical destruction of the instrument, or by an express revocation by a will in writing. (*Smith v. Wait*, 4 Barb. 28. *Nelson v. McGiffert*, 3 Barb. Ch. 158.)

The revised statutes have sought to define the cases of *implied* revocation, arising from some change in the social relations of the testator, some different disposition of his property, or from a subsequent will, not expressly revoking a former one, but making devises incompatible with those in the former instrument. These questions formerly rested on the decisions of the courts, and with respect to some of them there was a contrariety of opinion. It was held that a subsequent marriage and birth of a child amounted to an implied revocation of a will either of real or personal property; but that *such presumptive revocation might be rebutted by circumstances*. To work a revocation it required the concurrence of both circumstances, marriage and the birth of a child. Neither circumstance alone was enough for that purpose. Neither this or any other implied revocation was within the statute of frauds. (*Burch v. Wilkins*, 4 John. Ch. 506.) The subject was fully examined, and the English cases reviewed, by the chancellor, in the case last

cited; and it was that case which led to the adoption of the legislative provision on the subject. It is contained in the 43d section. (2 R. S. 64.) It is there enacted that if after the making of any will disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and *no other evidence to rebut the presumption of such revocation shall be received.* This last provision, excluding parol evidence to rebut the implication of a revocation, was inserted to repudiate the suggestion to the contrary by the chancellor, in *Burch v. Wilkins*, (*supra.*) To prevent marriage and the birth of a child from working a revocation of the will, the provision for such child must either be contained in the will, or some settlement, or be so mentioned in the will as to show an intention not to make such provision. The intention, which is to govern, must thus be indicated by some writing, and cannot be made out by extrinsic oral evidence.

It is not important whether the testator, at the time he made his will, was a bachelor, or a widower, or a married man, with children. If he loses his wife, and again marries and has a child by his second wife, he falls within the letter as well as spirit of the act. (*Havens v. Van Den Burgh*, 1 Denio, 27.)

Another instance of implied revocation by marriage occurred where an unmarried woman having executed a will, should marry. This act is declared to be a revocation of her will. This was so at common law, upon the ground that it is of the essence of a will that it should be valid during the remainder of the deviser's life. For this reason the will of a feme sole ceased upon her becoming covert. (*Doe v. Staples*, 2 D. & E. 696, *per Lord Kenyon.*) The principle on which the common law was based sprung from the disability of a married woman to devise her estate. The revised statutes have adopted this provision without qualification. Since the act of 1860, chap. 90, and the act of 1849, relative to married women, (*L. of 1849, ch. 375,*) have in a great measure removed the disability of married women, the common law basis of the principle is in

a great measure removed. The statute, however, remains unaltered, and it is believed, is still obligatory.

By the common law, an agreement or covenant, made for a valuable consideration, to convey lands, which had been previously devised by will, operated in equity, though not at law, as a revocation of such devise. In cases of this kind the legal estate passed to the devisee; but the court of chancery would compel him to convey it to the person entitled under the equitable agreement. (*Cotter v. Loyer*, 2 P. Wms. 623, 626.) The revised statutes provide for such cases and prevent the agreement of the devisee from operating as a revocation, either at law or in equity. They direct that the property shall pass by the devise, subject to the same remedies for a specific performance or otherwise, against the devisee, as might be had by law against the heirs of the testator, if the same had descended to them. (2 R. S. 64, § 45. *Langdon v. Astor's Ex'rs*, 2 Smith, 9.)

It was held more than a century ago, that if A. devises lands, and then makes a mortgage thereof in fee, it is a revocation in law, but otherwise in equity. (*Hall v. Dunch*, 1 Vern. 329, approved in *Sparrow v. Hardcastle*, 3 Atk. 805.) It was deemed expedient by the legislature, at the time of the revision, that the rule in this respect should be uniform in all the courts. As the rule in equity was thought to be the most reasonable, it was in substance adopted, by declaring that a charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate previously executed; but the devises and legacies therein contained shall pass and take effect subject to such charge or incumbrance. (2 R. S. 64, § 46.) The statute makes no distinction between a mortgage in fee, or for a term for years. It does not leave one rule to be operative at law, and another in equity; but makes the provision general.

It was held, too, before the revised statutes, that where an estate, specifically devised, was sold by the testator, by an executory contract, it was a revocation of the devise, in equity, though not at law; for the estate, from the time of the contract, was in equity considered as the estate of the vendee. And although such executory contract was revoked by the purchaser and testator, so that the latter was restored to, and died seised of his former estate, the devise was not thereby restored. The devise being once revoked, could not be made effectual but by a republication of the will.

(*Walton v. Walton*, 7 *John. Ch.* 258.) It was considered essential to the validity of a devise of lands, under the former law, that the testator should be seised thereof at the time of making the will, and should continue so seised without interruption until his decease. If therefore a testator, subsequently to his will, by deed aliened lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void. (1 *Jarman on Wills*, 170, *Perkins' ed.*) We have seen that since the revised statutes, a will may be so drawn that it will operate to pass the real estate of which the testator was seised at the time of his death. The legislature intended to provide for the effect of conveyances by the testator, upon devises made by him, and to make the rule uniform at law and in equity. It was therefore enacted, that a conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeathed by him shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest. (2 *R. S.* 65, § 47.) The subsequent section provides that if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of the previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen. (*Id.* § 48. *Brant v. Wilson*, 8 *Cowen*, 56.)

A devise is revoked by the conveyance of the land devised, notwithstanding the conveyance be to the devisee. The latter will then hold under the deed and not under the will. (*Rose v. Rose*, 7 *Barb.* 174.) Nor will the effect be altered, when the testator sells and conveys the land devised, if he takes back a bond and mortgage for the purchase money or any part of it. (*Adams v. Winne*, 7 *Paige*, 97. *Brown v. Brown*, 16 *Barb.* 572.) The conveyance is not merely an alteration of the estate, but completely divests the testator of all title to it. The mortgage taken back is a mere security for the payment of the money. In the last mentioned case, it was

said that if the land devised is reconveyed to the devisor, and the title is in him at the time of his death, it will pass under the will without any formal republication thereof. This was put upon the ground of the statute (2 *R. S.* 57, § 5) which allows a testator to devise all the real estate of which he is the owner at the time of his death. The statute abolishes the technical rule, that a devise passes only such real estate as the testator was seised of at the time of making the will; but the *intention* must be expressed to pass the estate, and such intention will be regarded. (*Pond v. Bergh*, 10 *Paige*, 140, 149. *Arthur v. Arthur*, 10 *Barb.* 9. *Ellison v. Miller*, 11 *id.* 332. *Knight v. Weatherwax*, 7 *Paige*, 182.)

The revised statutes have also provided for the case of post testamentary children, or such children as are born after the making of the will, either in the lifetime of the father or after his death. Having provided for an after-born child in the case of an intestacy, there was an obvious and equal reason for some similar provision in the case of a will. If after the making of his will by the testator, he shall have a child born, either in his lifetime or after his death, and shall die leaving such child so after-born unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, such child, it is enacted, shall succeed to the same portion of the father's real and personal estate as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will. (2 *R. S.* 65, § 49.) The object is to put such child, as far as practicable, in the same situation as if it had been in being when the will was made, and been equally provided for by the testator. The presumption is a fair one, that it shared the regard of the parent equally with the other objects of his bounty, though not provided for by settlement or named in the will. If provision were made for it by settlement, or a specific provision in the will, or if the latter directed that no provision should be made for it, the statute has no application to the case, but leaves it to be governed by the will or settlement.

No distinction whatever is made by the statute, between specific, general, or residuary legatees, or devisees, and none was probably intended. The object was, not to disturb the arrangement which the testator had made in the disposition of his property, among the several objects of his bounty, except so far as to compel each to

contribute ratably, out of that which he would be entitled to according to the will, for the purpose of making up the distributive share of the post testamentary child. All the legacies, therefore, have to abate in proportion to their amount and value, as well the residuary legacy, or one given in lieu of dower, as the specific and general legacies. (*Mitchell v. Blain*, 5 Paige, 590.)

A partition made amongst tenants in common is not such a change of the subject of the devise as to work a revocation of it. If the tenant in common should devise his undivided moiety, and then make partition either voluntarily, or it be made by order of the court during the lifetime of the testator, the devise would pass the estate in severalty, which, at the making of the will, was held in common. (*Risley v. Baltinglass*, T. Raymond, 240. *Barton v. Croxall*, Taml. 164.)

A conveyance, to have the effect of revoking the whole will, must be coextensive with the estate devised. If it be but of a part, it affects the devise, only *pro tanto*. (*Adams v. Winne*, 7 Paige, 101. *Herrington v. Budd*, 5 Denio, 323.) In the last mentioned case it was held that a grant in fee, reserving rent, with a clause of re-entry, is a revocation of a prior devise of the same lands made by the grantor.

The revised statutes have prevented, in certain cases, the lapse of a devise or a legacy—we are treating only of devises. If the testator devises real estate to a child, or a lineal descendant of the testator, and the devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive the testator, the devise does not lapse, but vests in the surviving child or descendant of the devisee, as if such devisee had survived the testator and died intestate. (2 R. S. 66, § 52. *Bishop v. Bishop*, 4 Hill, 138.)

There was, at one time, a contrariety of opinion as to the effect of the revocation of a subsequent will, in setting up one which had previously been made. The courts of common law were said to favor the revival of the former will, but the ecclesiastical courts either allowed a different presumption, or left it open to be decided by other testimony. The question does not seem to have been settled in this state by any adjudication prior to the revised statutes. By those statutes it is put at rest by declaring that no revocation of a second will shall revive the first will, unless it appears by the terms

of the revocation that it was the intention of the testator to revive and give effect to the first will; or unless after such destruction, cancelling or revocation, he shall duly republish his first will. (2 R. S. 66, § 53.)

A republication of a will is of two kinds, *express* and *constructive*. *Express* republication arises when a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will. (1 *Jarm. on Wills*, 202, *Perkins' ed. Will. on Ex'rs*, 132.) *Constructive republication* takes place when a testator, for some other purpose, makes a codicil to his will; in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will. (*Id. and Van Cortland v. Kip*, 1 *Hill*, 590.) The codicil need not be *actually annexed* to the will, in order to operate as a republication. When the codicil is so executed as to operate as a republication of the will, both should be read and construed together as one entire instrument. The effect of the codicil which republishes a will is to bring down its language so as to cause it to speak as of the date of the codicil; and this whether the immediate subject of the codicil be real or personal property. (*Id.*)

The statute above cited has reference only to a republication of a will which has been previously revoked. The object of it was to prevent a revocation from having the effect *per se* of reviving the first will, unless it should appear by the instrument by which the revocation was effected, that it was the testator's intention to give effect to the former will.

But occasions may arise when the testator may desire to republish a will, which has never been revoked; so that it may speak from the day of such republication. The statute does not prevent such republication, but leaves the matter to be regulated by the general laws on the subject. It may thus be republished by repeating the solemnities attending its first execution, or by a duly attested codicil. (*Mooers v. White*, 6 *John. Ch.* 375. *Van Cortland v. Kip*, *supra*. *Jackson v. Potter*, 9 *John.* 312.) Such codicil may give effect to a devise in the original will which was void by reason of the devisee being a necessary subscribing witness. So also if the original will be defectively executed, the effect of the codicil, if properly drawn and attested, whether annexed to the will or not, is to remove those imperfections and give efficacy to the will. (*Barnes*

v. *Crowe*, 1 *Ves. jun.* 486, 497. *Atherton v. Robins*, 1 *Adol. & Ellis*, 423. *Havens v. Foster*, 14 *Pick.* 543. *Miles v. Boyden*, 3 *id.* 216. *Pigott v. Waller*, 7 *Ves.* 98.) Even though the codicil relates only to personal property, and expresses no intention as to republication of the will, it is a republication of a will devising real estate. (*Id.*)

But though such be the ordinary effect of a codicil, yet it may be so expressed as to have only the effect of a republication, giving no different operation to the several instruments (if there be more than one codicil) from that which they would have if they stood upon their original execution, and therefore not make the will and previous codicils speak as from the date of the republication, for the purpose of reviving legacies which have been adeemed or satisfied. (*Langdon v. Astor's Ex'rs*, 2 *Smith*, 9.)

SECTION VI.

Of Void Devises, and the Effect thereof.

There are several cases in which devises are absolutely void. By the common law, if the testator makes the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary, is void. Therefore, if the testator devises his real estate in fee to his heirs at law, the devise is a nullity, and the heir takes under the law of descent, which is the better title. This rule has been changed in England, so as to require the devisees to take under the will and not by descent, (3 and 4 *Wm.* 4, *ch.* 106,) but it remains still in force in this state. A devise which we sometimes see in wills, that the widow of the testator shall have her dower, is void; for she takes her dower by the common law, and it is not in the power of the husband to prevent it. If, however, the testator devises a life estate to his wife in a part of his lands and gives the rest to his children, the widow will take the devise and her dower besides; the first under the will and the last by the common law. (*Jackson v. Churchill*, 7 *Cowen*, 287.) We have seen, elsewhere, when the widow is put to her election between a devise and her dower. (*See ante*, page 69.)

We have seen in a previous section that no devise of real estate for the benefit of any person and his successor or successors in any ecclesiastical office, shall vest any estate or interest in such person or his successor. The title in such a case, on the death of the tes-

tator, does not descend to the heirs of the devisor, but vests in the people of the state of New York, in the same manner and with the same effect as if the person holding the legal title thereto had died intestate, and without heirs capable of inheriting such estate. (*L. of 1855, ch. 230. 2 R. S. 621, 5th ed.*)

The devises to charitable corporations, formed under the act of 1848, chapter 319, and the amendments thereof, (*2 R. S. 623 et seq. 5th ed.*) are void, if the will containing the same, being made by a person leaving a wife or child or parent, has not been made and executed at least two months before the death of the testator; and if the testator has devised or bequeathed to the institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts. It is in such case valid to the extent of the one-fourth and void for the excess. The statute does not direct how the estate so unlawfully devised shall go, but leaves it to descend to the heir at law, if it be real estate, and to pass to his next of kin if it be personal.

This prohibition has been extended and made general by the act of April 13, 1860, page 607. It is there enacted, that no person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts; (and such devise or bequest shall be valid to the extent of one half and no more.) It is thus made applicable to devises and bequests to any of the societies therein named, and is not confined to such as were formed under the act of 1848. It preserves for the kindred of the devisor a larger portion of the estate, and it renders the devise or bequest of the excess above one-half, to the purposes of charity therein indicated, without reference to the time when the will was made; whether by the testator *in extremis*, or in the vigor of mental and bodily health. The tendency of the law, and such probably was the object of its framers, will be to diminish charitable devises and bequests by persons having either of the relatives above mentioned. It thus gives a preference to the claims of consanguinity over those of benevolence, with respect to estates of deceased persons. If an individual desires to devote his wealth to religious, benevolent or public purposes, he is not prohibited from doing so in his lifetime, when he can see to the administration of it himself. (*See remarks*

of the Judge in *Beekman v. The People*, 27 Barb. 305, and *Willard's Eq. Juris.* 576.)

We have seen that a devise to an alien, not authorized by statute to hold real estate, is void. (2 R. S. 57.)

A devise may become void by the death of the devisee subsequent to the making of the will, and before the death of the testator. This is the common law rule; but it has been changed in this state, where the devise is to a child or other descendant of the testator, and such devisee shall die before the testator, leaving a child or other descendant who shall survive the testator. In such a case, the devise does not lapse, but vests in the surviving child or other descendant of the devisee, as if the devisee had survived the testator, and had died intestate. (*Id.* 66, § 52.) In other cases the common law is left to take its course. (*Bishop v. Bishop*, 4 Hill, 139. *Chrystie v. Phyfe*, 22 Barb. 195.)

A devise may be void for *uncertainty*. The uncertainty may be with regard to the *person* of the devisee, or the subject matter of the devise.

An instance of the first will be found in *Waite v. Templer*, (2 Sim. 524.) In that case the legacy was in these words: "I give one-fifth of my remaining property to Thomas Palby, Esq. jun., who resided in Stonehouse, near Plymouth, Devonshire, when I left England, or to his heirs, executors, administrators or assigns forever." The testator left England in 1784, Thomas Palby, jun. died in 1798, and left his father his only next of kin at his death. The testator died in 1810. The legacy lapsed by the death of the legatee in the lifetime of the testator, and the legacy over to his heirs &c. was held to be void for uncertainty.

So also, a bequest by a testator, that "a handsome gratuity" be given to each of his executors, has been held to be void for uncertainty, as to the subject of the gift. (*Jubber v. Jubber*, 9 Sim. 503.) So a bequest of "some of my best linen," has been held void for uncertainty. (*Peck v. Halsey*, 2 P. Wms. 387.)

There must be such a description of the estate intended to be devised, and of the devisee, that both the estate and the person may be ascertained; otherwise the devise is void.

It remains, under this head, to inquire what becomes of a void devise, when it lapses, in a case where the will contains a residuary clause. In the case of a bequest of personal property, the residu-

ary legatee will in general take whatever is not otherwise well disposed of in the will. The rule is different with respect to devises.

If the devise be void when the will was made, as, if the devisee be dead at that time, the estate will go to the residuary devisee, if it be drawn in a sufficiently comprehensive manner. In the case of a legacy void by reason of the death of the devisee *after* the making of the will, and before the death of the testator, it goes to the heir.

This subject was very fully examined by the chancellor in *Van Kleeck v. The Reformed Dutch Church*, (6 Paige, 600; *affirmed* 20 Wend. 457.) He came to the conclusion that it was settled in England that a residuary devise of real estate, or "of all my estate not before disposed of," carries with it not only the real estate in which no interest is devised in the previous parts of the will, but also every reversionary and contingent interest which, in the events contemplated by the testator as apparent from the will itself, is not wholly and absolutely disposed of, and which would be a proper subject of devise consistently with the declared intent of the testator. The rule is that the general residuary clause will carry to the devisee all reversionary and contingent interests not previously devised, unless the will contain special indications of a contrary intention; and with the qualification, that the will is to be taken in connection with the situation of the testator's property and family at the date of the will. This, it seems, is the law of this state. But when a specific devise is ineffectual, through want of the devisee's capacity to take—as when the devisee is a religious corporation—the estate goes to the heir, and not to the residuary devisee. (*Id.*)

When an interest in real estate is devised to a widow in lieu of dower, and she elects to take her dower, it seems such interest vests in the residuary devisee. (*Bowers v. Smith*, 10 Paige, 193.)

CHAPTER X.

OF THE CONSTRUCTION OF DEVISES.

SECTION I.

Of the General Maxims in the Construction of Wills.

1. The primary rule in the construction of a will, whether it relates to real or personal property, is that the *intention* of the testator, if not inconsistent with the rules of law, must govern; and this intention is to be ascertained from the whole will taken together. (*Bradhurst v. Bradhurst*, 1 Paige, 331. *Covenhoven v. Shuler*, 2 *id.* 122. *Rathbone v. Dyckman*, 3 *id.* 9. *Crosby v. Wendell*, 6 *id.* 548.)

This rule is supported by all the adjudged cases, and is, moreover, declared by the revised statutes, and made applicable to every instrument creating or conveying, or authorizing the creation or conveyance, of any estate or interest in lands. And it is made the duty of courts of justice to carry into effect the intent of the parties, so far as it can be ascertained from the whole instrument, and is consistent with the rules of law. (1 *R. S.* 748, § 2.) This enactment is merely declaratory of the principles of the common law so far as it relates to wills, and an extension of the same principle to deeds which were formerly governed by more strict rules.

2. A will and codicil are to be taken and construed together as parts of one and the same instrument. (*Westcott v. Cady*, 5 *John. Ch.* 334.)

3. The testator must be presumed to have used words in their primary and ordinary sense, unless there is something in the situation of his family, or in his will, to lead to a contrary conclusion. (*Matter of Hallet*, 8 Paige, 375. *Hone v. Van Schaick*, 3 *Barb. Ch.* 488, *reversed* 3 *Comst.* 538, *but the above principle held by both courts.* *Cromer v. Pinckney*, 3 *Barb. Ch.* 466.)

4. In general, technical words are to be understood in a technical sense; but if by taking them in a technical sense, the intention of the testator collected from the whole will, cannot be supported, but will be overthrown, a liberal and popular meaning may be attributed to them. As, for instance, the word "*inherited*" may be ap-

plied to lands devised or conveyed by a parent or ancestor. (*De Kay v. Irving*, 5 Den. 646, affirming 9 Paige, 521. 2 P. Wms. 741. *Hodgson v. Ambrose*, 1 Doug. 341.) The word "devise" is sometimes used for "bequeath," and vice versa, without impairing the will. (*Myers v. Eddy*, M. S.) And "or" is sometimes construed as "and," and *e converso*. (*Richardson v. Spragg*, 1 P. Wm. 434. *Read v. Snell*, 2 Atk. 643.)

5. The situation of the testator's family and collateral circumstances, may be resorted to in construing a will. So also the situation of his property, and his social relations, are to be regarded. (*Wolfe v. Van Nostrand*, 2 Comst. 436. *Cromer v. Pinckney*, 3 Barb. Ch. 466.)

6. The *general intent* of the will is to prevail over expressions indicating a different *particular intent*. (*Parks v. Parks*, 9 Paige, 107.)

7. When a will is susceptible of a two fold construction, one of which avoids and the other upholds it, the latter must be adopted. (*Mason v. Jones*, 2 Barb. 229.)

8. If two provisions of a will are repugnant, so that both cannot stand, the last will prevail. (*Bradstreet v. Clark*, 12 Wend. 602. *Covenhoven v. Shuler*, *supra*. *Parks v. Parks*, *supra*.)

9. But a subsequent clause apparently irreconcilable with precedent provisions, will be construed in connection with them, and may be rejected if repugnant to the intention of the testator, as derived from the whole will. (*Bradly v. Amidon*, 10 Paige, 235.)

10. The clear, literal interpretation of words may be departed from, if they will bear another construction; and the strict grammatical sense may be neglected. (*Bradhurst v. Bradhurst*, 1 id. 331. *Rathbone v. Dyckman*, 3 id. 9.)

11. In construing wills words may be transposed or rejected to get at the correct meaning. (*Mason v. Jones*, 2 Barb. 229.) Words which, if allowed to stand, would produce repugnant and inconsistent results, may be rejected. (*Pond v. Bergh*, 10 Paige, 140.)

12. Words which admit of a twofold construction, shall be deemed to have been used in that sense which will render the devise valid, and not in a sense which would render the clause of the will in which they are used a mere nullity. (*Pond v. Bergh*, *supra*. *Butler v. Butler*, 3 Barb. Ch. 304.)

13. The title of the heirs being derived from the law of descent, is not to be defeated by an uncertain devise.

14. The punctuation of sentences may be changed, and a passage be read as if inserted in a parenthesis, when necessary to arrive at the sense. (*Wolfe v. Van Nostrand*, 2 *Comstock*, 439, *per Gardiner, J.*)

The foregoing rules may be greatly multiplied; but others will be suggested in succeeding sections. The subject is examined by English writers, and the cases are fully reviewed. (*See Cruise's Dig. tit. 38, Devise, ch. 9, and notes to Greenl. ed. 2 Powell on Devises, by Jarm. pp. 5-11. Wigram on Wills, pp. 11-14.*)

SECTION II.

Of the Construction with reference to the Estate, the Property devised, and the Person of the Devisee.

1. *Of the Estate.*

The usual words necessary to create a devise are, "give and devise." These are the appropriate technical words in a will disposing of a fee or a freehold interest, as "give and bequeath" are for disposing of personal property and chattel interests. But any other words which sufficiently show the intention of the testator, to dispose of his lands, or any part thereof, will be sufficient for that purpose.

We have seen, in the former part of this treatise, that the meaning of the term *estate*, in a legal sense, is different from its popular acceptation. It imports in legal acceptation the *interest* which the owner has in the land, rather than the land itself, which is the popular notion with regard to it. (*See Part 1, ch. 1, p. 47.*) A devise of a testator's *estate* generally passes both real and personal property, and may include a debt secured by a mortgage. (*Jackson v. De Lancy*, 11 *John*. 365; *affirmed*, 13 *id.* 536.) The word *estate* passes a fee, without any words of limitation. (*Id. Jackson v. Merrill*, 6 *John*. 185.) So a devise of all one's right carries a fee simple to the devisee. (*Newkirk v. Newkirk*, 2 *Caines*, 345.) A general devise of real estate to A., to be at his absolute disposal, passes a fee. (*McLean v. McDonald*, 2 *Barb.* 534.)

No technical words are necessary to devise a fee, and the intention of the testator, to be collected from the whole will, is to govern. (*Jackson v. Babcock*, 12 *John*. 389.) These principles are adopted by the revised statutes, and made applicable to grants as well as to

devises. The term "heirs" is not required in any case to convey a fee in land; and every devise of real estate, or any interest therein, passes all the estate or interest of the testator, unless the intent to pass a less estate or interest appears by express terms, or is necessarily implied in the terms of the grant. (1 *R. S.* 748, § 1.)

A reference to a few of the cases will be sufficient to illustrate the principle applicable to these cases. In *Jackson v. Babcock*, (*supra*,) the testator devised as follows: "I give to my wife, after payment of debts, &c. all my estate, real and personal, that I may be in possession of at my decease, to be at her absolute disposal, according to an agreement made and entered into with her on the 27th October, 1802, and previous to our marriage; it being my intention, if my said wife should die before me, that my real and personal estate shall be divided among my said children, their heirs and assigns." It was held by the supreme court that the wife took an estate in fee, not by implication, but by force of the words "all my estate to be at her absolute disposal;" that as by reference to the agreement in writing mentioned in the will, it appeared that it was intended, that after the death of one, the other should have the full benefit of survivorship in the joint estate created by the agreement, it showed the intention of the testator to dispose of the fee; and the use of the word heirs, in the devise to the children, did not show an intention in the testator to limit the preceding devise to his wife to her life only.

In the subsequent case of *Jackson v. Howard*, (17 *John.* 281,) the words of the will, without any other words to explain or control them, were, "my property, after my debts are paid, I leave to my beloved wife A., and wish her to educate my daughter with care and affection." It was held that the wife took the real estate in fee, and the personal absolutely.

A devise by implication depends upon the intention of the testator; and one implication may be rebutted by another equally strong. If the particular devise or bequest cannot be reasonably accounted for, except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property or of the previous estate therein, courts will imply such disposition. (*Rathbone v. Dyckman*, 3 *Paige*, 9.)

Under the law in force before the revised statutes, if the devise contained no words of limitation, or perpetuity, the devisee could take only a life estate. (*Jackson v. Wells*, 9 *John.* 222. *Same v.*

Embler, 14 *id.* 198.) We have seen what other words would supersede the necessity of words of limitation, formerly; and that those words are not now required in order to create an estate in fee.

Nevertheless, a careful conveyancer, in framing a will or deed, will use the words which necessarily carry the fee simple, and which leave no room for construction; or if a less estate be intended to be conveyed, will so express it as to leave no room for argument or dispute. *I give and devise to A. M., his heirs and assigns forever*, is the appropriate expression for a devise of an estate in fee simple, and can as easily be used as an equivocal expression.

With regard to introductory words in a will, it should be remembered that they are often words of course, and unless the words of disposition in the clause of the devise are connected in terms or sense, with the introductory clause, they are not sufficient to enlarge the estate subsequently devised, into a fee. (*Barheydt v. Barheydt*, 20 *Wend.* 576, *per Nelson, Ch. J.* *Van Derzee v. Van Derzee*, 30 *Barb.* 331.) Nevertheless, in the inquiry concerning the intention of the testator, in relation to the *quantum* of estate devised, the introductory clause of the will is very material. (*Fox v. Phelps*, 17 *Wend.* 393, *per Bronson, J.*)

It sometimes happens that in the same will there are various devises, and to different persons, some of which are invalid as conflicting with some rule of law. In this class of cases the question will sometimes arise whether the whole will is void, or only the devises which are illegal. The leaning of the courts, in modern times, is more and more to the preservation of such parts of the will as may be separated from the rest without a disruption of the whole. It is therefore a well established rule, that where the devises are distinct, or one part can safely be detached from another, without disturbing the relation or continuity of the whole, it should be done. (*Post v. Hover*, 30 *Barb.* 313, *per Hogeboom, J.*)

But if the principal trusts created by a will be adjudged void, and thus the main intent and object of the testator be defeated, life estates in other lands given by a codicil executed by the testator to other parties for whom provision was made under the principal trusts, are void also, and the whole estate passes to the heirs at law. (*Coster v. Lorillard*, 14 *Wend.* 265, *reversing same case*, 5 *Paige*, 172.)

2. Of the property devised.

The words *lands, tenements and hereditaments*, will pass every species of property; and have been held to carry money directed to be laid out in the purchase of land. This is upon the principle that what is agreed to be done is treated as done. (*Cruise's Dig. tit. 38, Devise, ch. 10, §§ 62, 63.*)

A general devise of all the testator's real estate will carry his real property of every description, and every estate or interest which he has therein, either in possession, reversion or remainder, whether absolute or contingent, unless restrained by other words of the will. (*Pond v. Bergh, 10 Page, 149.*) So a devise of all the land and real estate which the testator was to get out of his father's estate, carries a contingent interest given by the father's will. (*Id.*)

So a devise of all the testator's interest in the real estate which might fall to him from the estate of his brother Philip—Philip having an absolute title to some, and a determinable fee to other lands—was construed as a devise of the testator's contingent title to the latter under a prior will. (*Id.*)

The expression “the farm I now occupy,” is often used in devises as expressive of the thing devised. But the expression cannot be enlarged by parol evidence so as to include other lands of the testator in the same tenure, under a lease from the testator for a term of years. Where those words are used to designate the thing described as distinct from other things, they cannot be rejected as surplusage, and be made to embrace lands not in truth occupied by the testator at the time. (*Jackson v. Sill, 11 John. 201.*)

An additional description of the subject of devise cannot vitiate, but must be rejected, if false. In *Doe v. Roe, (12 Wend. 578,)* the devise was of “all the land I own which lies along the Schoharie creek, and known by the name of Ten Eyck's patent.” The farm lay along the creek, but not in Ten Eyck's patent, and the devise of it was held good.

This is upon the maxim that *falsa demonstratio non nocet*, or, as it is expressed in Lord Bacon's maxims, (*Reg. 25, Veritas nominis tollit errorem demonstrationis.*) This is applicable only to cases where the object of the devise or the thing devised is sufficiently certain without the demonstration or description. In such a case, if the latter be false it does not vitiate; but may be rejected as surplusage. (*11 John. 218.*)

In *Brownell v. Brownell, 19 Wend. 367,)* the testator owned the one

half of lot No. 137, the whole of which lot contained about one hundred and twenty acres. He devised "the one-half of lot No. 137, containing sixty acres of land." It was held that the whole of the half passed by the devise. The words "containing sixty acres of land" might be rejected as a false description of the whole lot; or by referring it to the "half," instead of "lot," the last antecedent might, in either case, be made intelligible.

When the description of the property is insufficient of itself to designate any particular class of lands owned by the testator, resort must sometimes be had to extrinsic facts, in order to apply the devise to its subject. Thus in *Ryers v. Wheeler*, (22 Wend. 148,) the devise was of "all my back lands;" parol evidence was held to be admissible to designate the premises, as by showing that certain lands owned by the testator, were called and known by him and his neighbors, by that designation.

Land may be devised with reference to its value, without giving a description by metes and bounds. A devise of land to the value of \$1500 to be taken, at an appraisal, out of any except certain land of the testator, and to be taken out of such lands as the devisee should select, with that exception, was held by the chancellor to be a valid devise, and to mean lands which shall be of the specified value, over and above all charges, incumbrances or claims thereon, which might render it less valuable to the owner thereof. (*Neilson v. Neilson*, 6 Paige, 106.)

We have seen that the word *estate* has reference technically to the quantity of interest. But it will pass every kind of property of a real nature, unless restrained by other words. (2 *Preston on Estates*, 68-173.) A devise of the testator's estate generally, passes both real and personal estate. (*See ante*, p. 506.) When a testator has an estate of his own, and holds another in trust for others, a general devise in the residuary clause giving all his estate "after payment of his debts, legacies and funeral expenses," was held to pass only the estate in which he had a beneficial interest. (*Roe v. Reade*, 8 T. R. 122, per Lord Kenyon, Ch. J.) With us, a trust estate cannot be devised at all; but the case is important only to show how a general devise may be qualified by other words in the will.

The words "all I am worth," without any other words to control them, will pass real as well as personal property. So a devise of "all that I possess in doors and out doors," is sufficient to pass real

estate. (*Pitman v. Stevens*, 15 *East*, 505. *Thomas v. Phelps*, 4 *Russell*, 348.)

The word "legacy" may be applied to a real estate, if the contents of the will show that such was the intention of the testator. (*Hardacre v. Nash*, 5 *T. R.* 716.) And the word "devise" may be used in reference to a bequest of personal property, without injury to the will; the meaning being in all respects plain. (*Myers v. Eddy*, *supra*.) And real property will pass under the description of personal, if it is manifest that such was the intention of the testator. (*Cruise's Dig. tit. 38, Devise, ch. 10, § 78*.)

The draftsman of a will should avoid all disputes of this nature, by using the proper technical terms "give and devise," when the object is to pass the title to freehold interest, and "give and bequeath," when a personal legacy only is intended.

3. *Of the person of the devisee.*

On this subject, it may be remarked, that any words which are sufficient to denote the person intended by the testator, and to distinguish him from all others, is a sufficient description.

A reference to a few of the cases will be enough to illustrate the rule.

In *Gardner v. Heyer*, (2 *Paige*, 11,) it was said by the chancellor, that if there are no persons answering the description of the legatees, in the legal sense of the term used in describing them, it is allowable to prove the situation of the testator's family, to enable the court to ascertain the legatees intended. It was said also, in the same case, that a devise to children, without other description, as a general rule, means legitimate children; and if the testator has such children, parol evidence cannot be received to show that a different class of persons is intended; but he, having illegitimate children, proof of circumstances *dehors* the will was held admissible to show that they were the children intended.

In *Ryers v. Wheeler*, (22 *Wend.* 150,) Cowen, J. said, a nickname, or a name by reputation, given by the testator, and current in his family and neighborhood, is sufficient to designate the devisee.

A mere misdescription of the legatee does not render it void, unless the ambiguity is such as to render it impossible to ascertain, from the will itself, or by evidence *dehors* the will, who was the intended legatee. (*Smith v. Smith*, 4 *Paige*, 271.) That case re-

lated, it is true, to personal property; but the principle is the same in a devise of the realty.

The word children does not ordinarily include grandchildren, or any others than the immediate descendants in the first degree, of the person named as the ancestor. But it may include them when there were no children in existence at the time of the making of the will; or when there could not be any children at the time, or in the event contemplated by the testator; or when the testator has clearly shown by the use of other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren, or step-grandchildren. (*Mowatt v. Carow*, 7 Paige, 328.) When there is nothing in the will to show that the testator intended to use the word children in a different sense, it will not be held to include illegitimate offspring, step-children, children by marriage only, grandchildren, or more remote descendants. (*Cramer v. Pinckney*, 3 Barb. Ch. 475.) In the case last mentioned several other questions arose with respect to the persons intended by the will. And it was held that the words nephews and nieces, in their primary and ordinary sense, mean the immediate descendants of the brothers and sisters of the person named; and do not include grand-nephews and grand-nieces, or more remote descendants. (*Fulkner v. Butler, Ambler*, 514.)

But the peculiar circumstances of the case, and the structure of the will, may show that the testator used the terms nephews and nieces in an enlarged sense, so as to include all the grand-nephews and nieces whose parents were dead. In the same case the testator, by one clause of his will, gave a legacy unto each of his nephews and nieces except J. C., who was not a nephew, but one of the children of a deceased nephew; and by another clause he gave to the children of his nephew J. C. \$500—it was held that the brothers and sisters of J. C., and other grand-nephews and nieces whose ancestors were dead at the time of the making of the will, were entitled to the legacies. It was also held that parents and children could not both take, under the description of the testator's nephews and nieces, but only the parents who were living, and those grand-nephews and nieces whose parents were dead. (*Cramer v. Pinckney*, *supra*; and see *Hone v. Van Schaick*, 3 Barb. Ch. 488, and *S. C. 3 Comst.* 538.)

As no person can in strictness be said to be the *heir* of a person

now living, it is necessary that if a devise be given to a person by that designation, it must be shown by the will that heir *apparent* was intended, or it will be void. If the devise be to the heirs of the body of B. *now living*, it has been held to be a good description of the person. It shows that heir *apparent* is the person meant. But a devise to the heirs of B., who was in truth living, but that fact not stated in the will, is void. (*Heard v. Horton*, 1 Den. 165.)

A limitation by means of an executory devise, may be made to any number of persons for life successively, if *in esse* at the death of the testator,—to infants *in ventre sa mere*, and to persons unborn. Such was formerly the law, and is still, except that by our revised statutes (1 R. S. 723, §§ 15–17) successive estates for life shall not be limited to more than two persons in being at the creation thereof; and if limited to more than two, all the life estates subsequent to the two first entitled, shall be void. It was at one time doubted whether a limitation for life to an *unborn* person was good; but it is now well settled that it is, and also that an estate limited to the issue of such unborn person to take as purchasers, would be void, being a possibility upon a possibility, which the law will not admit. (*Jackson v. Brown*, 13 Wend. 441, 442. *Stewart v. Nicoll*, 3 John. Cas. 18. *Chapman v. Brown*, 3 Burr. 1635, *per Wilmot, J.*)

The word *issue* is a sufficient designation of a person in a devise. It comprises children and grandchildren. (*Merest v. James*, 1 Brod. & Bing. 484. *Kingsland v. Rapelye*, 3 Edw. 1.)

A devise to the testator's wife during her natural life; and at her decease to be equally divided amongst the "*relations on his side*," has been held good, and to belong to those persons to whom the personal estate of the testator would go under the statute of distributions. (*Doe v. Over*, 1 Taunt. 263.) Unless the word "*relations*" was thus restricted, it would embrace an almost boundless range of subjects; for it would comprehend every degree of consanguinity however remote. (*See 2 Jarman on Wills*, 25–68, *various cases collected.*)

SECTION III.

Of Devises Void for Uncertainty, and of the Remedy when the Will is of Doubtful Construction.

From what has been said in the foregoing section it would seem that a devise will be void, if there be so much uncertainty, either in the subject of it, or of the person intended, as to be incapable of any clear meaning. (*Mason v. Robinson*, 2 *Sim. & Stu.* 295.)

Although, in the construction of wills, great indulgence is shown to the ignorance, unskillfulness and negligence of the testator; and no testamentary disposition of property will be rendered invalid by a failure to comply with mere technical rules and forms of expression, or by grammatical or orthographical errors, nor by a confused collocation of sentences, if the intention of the testator can be discovered from the whole will. But if this cannot be ascertained, the intended disposition will fail. Conjecture is not permitted to supply what the testator has failed to indicate. The law has provided a definite successor to the property of its dying owner, in the absence of a legal disposition of it. The law must therefore take its course, if the testator from any cause fails to make a disposition of it in language that can be understood. (1 *Jarman on Wills*, 322, *Perkins' ed.*)

There are, in modern times, fewer instances of devises void for uncertainty than in an earlier state of the law. This may be owing to a better understanding of the rules of construction, which have given a determinate meaning to many words and phrases once considered vague and insensible, or to greater skill in the courts in the application of these rules; or to both those causes.

A few examples of each kind of defects will be given. In the early case of *Bowman v. Millbanke*, (1 *Lev.* 130,) the words of the will were, "I give all to my mother, all to my mother." The question was whether this was sufficient to carry to the mother the testator's real estate. Here it was uncertain to what the word "all" referred. It might mean all his real property; it might be all his personal estate; it might be all his estate of whatsoever kind; or it might be all of a particular portion of his estate. It was adjudged by the court to be void absolutely for this uncertainty.

In the later case before Sir Thomas Plumer, M. R. (*Mohun v.*

Mohun, (1 *Swans*. 201,) the language of the will was : " I leave and bequeath to all my grandchildren, and share and share alike." Here no property was mentioned as the subject of the gift. It did not appear *what* he left to his grandchildren. It was contended that the difficulty would be removed by transposing the word "all," so that it should follow the word bequeath. But that, according to the preceding case, would leave it still uncertain. Besides, it was not a case in which the transposition of words is allowable. These words as they are situated were not inconsistent with the context. The word "all," though inoperative where the testator placed it, was not repugnant. The court held that there was an uncertainty, both in the subject and object of the bequest, and that it was therefore void.

In *Jubber v. Jubber*, (9 *Sim*. 504,) the testator, after making his will added a codicil, which was as follows : " I request a handsome gratuity to be given to each of my executors." Here no definite sum is bequeathed, nor is it said by whom the amount shall be ascertained. The will contained a provision that if any dispute should occur it should be settled by arbitration, which should be final without appeal and without reference to the law. It was held that this legacy was absolutely void for uncertainty. And the vice chancellor (Shadwell) said he should not do what Sir Joseph Jekyl did in *Peck v. Halsey*, as he conceived that he had no power so to do.

In *Peck v. Halsey*, (2 *P. Wms*. 387,) the testatrix bequeathed to one of her grandchildren by name, "some of her best linen." This was held to be void for uncertainty; but still the master of the rolls, Sir Joseph Jekyl, recommended to the residuary legatee to give some of the best linen of the testatrix to the legatee. Whether the recommendation was followed does not appear; but it is quite clear the court had no power to enforce it. In both the above cases the gift was entirely indefinite, as to quantity.

The indefiniteness of the gift constitutes no objection, if it be of the residue after satisfying previous legacies. (*Gibbs v. Tart*, 8 *Sim*. 132. *Surman v. Surman*, 5 *Madd*. 123.)

The same principles apply to the *object* of testamentary gifts. It is enough that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial; and this whether the object of the gift be a natural or an

artificial person. A mistake in the name of the devisee, or an erroneous description of him, will not vitiate, if from other parts of the will, or the surrounding facts, there is no reasonable doubt as to the person intended. But when the entire name of the devisee is left blank, no parol evidence is admissible to show who the testator intended. (*Baylis v. The Att'y Gen.* 2 Atk. 239.) In *Clayton v. Lord Nugent*, (13 M. & Wels. 200,) the case was this: The testator wrote his will on various pages of a book at different times, part of it being executed and attested in 1820, and the remainder in 1827. No devisees were mentioned by name; but the testator's real estates were devised, "first to K., then to ———, then to L., then to M.," &c. On a slip of paper, pasted into the book, and forming part of the will at the time of the attestation, in 1820, the testator stated that a "key and index to the letter, initials, &c. was in a writing case in the drawer of his writing desk, on a card." The testator died on the 11th of December, 1828, and on that day a card, in his handwriting, and signed by him, was found in the above writing desk, dated January 30, 1828, as follows: "K. signifies Eleanor Mary East. L. signifies Gilbert East Clayton. M. signifies second son of William Robert Clayton. N. signifies eldest son of Richard Rice Clayton," &c. Two years before the testator's death, a card with writing on it had been seen by a person lying before the testator, together with the book containing the will, which appeared to be similar to the card and writing thereon found after his death. It was held that the card found after the testator's death was not admissible in evidence, as a declaration of the testator, to show who were the persons meant to be designated in his will by the letters K. L. M. &c.

In *Miller v. Travis*, (8 Bing. 254,) it was said by Tindall, Ch. J. that it was a well established principle that where a complete blank is left for the name of the legatee or devisee, no parol evidence, however strong, will be allowed to fill it up; as intended by the testator.

Where, however, the blank was left for the *christian* name only, parol evidence has been admitted to prove the individual intended. (*Price v. Page*, 4 Ves. 680.) So in the case of a legacy to Mrs. G., it was referred by Lord Loughborough to the master to receive evidence to show the person intended. (*Abbot v. Massie*, 3 id. 148.) From the remarks of the judge who delivered the opinion of the court in *Clayton v. Lord Nugent*, (*supra*,) it would seem that the

foregoing cases went upon the ground that the testator was in the habit of calling the claimant in the one case Mrs. G., and the claimant in the other by his surname. When a testator has habitually called certain persons or things by peculiar names, by which they were not commonly known; if those names occur in his will, evidence of such habit seems receivable to explain the meaning of the will, in like manner as if his will had been written in cipher or in a foreign language. The habits of the testator, in these particulars, must be receivable as evidence to explain the meaning of his will. (*Per Lord Abinger in Doe v. Hiscocks*, 5 M. & W. 368.)

The case of *Parsons v. Parsons*, (1 Ves. jun. 266,) affords another example of a mistake in the name of the legatee, which did not defeat the object of the testator. The testator by his will gave an annuity to his brother *Edward* Parsons for life, and, after his decease, the same to go equally among his [E. P.'s] children "by his present wife;" and at the date of the will, the testator had no brother except one named *Samuel* who had a wife and children; but four or five years before, he had a brother named *Edward*, who, as well as his wife, was then dead; which fact was known to the testator, who by the same will gave legacies to his children. The testator had been in the habit of calling his brother *Samuel*, *Edward* and *Ned*. The lord chancellor, without argument, held that the children of *Samuel* were entitled.

In *Thomas v. Stevens*, (4 John. Ch. 607,) a legacy to *Cornelia Thompson* was held, by Chancellor Kent, to be a good bequest to *Caroline Thomas*, it being admitted by the executors and by proof *aliunde* that she was the person intended.

On the same principle, the case of *Connolly v. Pardon*, (1 Paige, 291,) was decided. In that case the testator, in a codicil, bequeathed as follows: "To my nephew *Cormar Connolly*, the son of my brother *Cormar Connolly*, the sum of five hundred dollars, for his ecclesiastical education, which sum is to be taken from what I have bequeathed to my brother *Cormar*, and to my sisters *Mary* and *Ann*." The testator never had a brother named *Cormar*, but he had a nephew *Cormar*, son of his brother *James*, the complainant, who, at the time of making the will, was pursuing classical studies in Ireland, with a view to an ecclesiastical education; and he was the only nephew of that name. The proper parties were before the court, and the bill was taken as confessed. The chancellor, after

considering the explanatory circumstances set up in the bill, held that the complainant was the object of the testator's bounty.

If the legatee can be ascertained, a legacy will not be permitted to fail on account of a misdescription of the legatee. (*Banks v. Phelan*, 4 Barb. 80.)

The same principles apply when the object of the testator's bounty is a corporation or a voluntary association. Thus, in the last cited case, a legacy in trust for "the ladies of the Ursuline order, residing in Charleston," was upheld, while the legatee intended was, "The Ladies' Ursuline community of the city of Charleston." And it was said that a bequest to a religious society, as such, is valid as a gift for pious and charitable uses, where there is no doubt or uncertainty as to who was the legatee intended, although the society be not incorporated.

Some of the cases referred to are of personal legacies, but the principle, so far as relates to the description of the person intended, is the same, whether it be a bequest of personal property, or a devise of real estate.

It sometimes happens that the testator has expressed his intention so ambiguously as to render it necessary to come into a court of equity for a construction of the will, or to remove the difficulty, and to obtain the direction of the court in relation to the whole, or some part of it. In cases of this kind, the cost of the litigation is within the discretion of the court, and is usually borne by the estate. (*Smith v. Smith*, 4 Paige, 271. *Rogers v. Ross*, 4 John. Ch. 608. *King v. Strong*, 9 Paige, 94.)

Courts of equity obtain their jurisdiction over wills, by virtue of their general jurisdiction over trusts. The jurisdiction is not confined to wills of personal property, but extends to all kinds of wills, whether they relate to real or personal property, or to both. Sometimes the object is to remove an uncertainty, either as to the person intended or the subject of the will. Some of these cases have been adverted to in this section already. Sometimes the bill is filed to remove an ambiguity; sometimes to enforce a charge, or to compel the execution of a trust, in favor of legatees or creditors; and sometimes to enforce contribution among the beneficiaries to remove a burden common to all. This branch of the subject belongs more appropriately to works on equity jurisprudence, to which the reader is referred. (*See Willard's Eq. Jur.* 483 et seq.)

SECTION IV.

*By what Words particular Estates and Conditions are Created,
and by what Words Lands are Charged.*

We have mentioned in the second section of this chapter, the manner in which a devise is created, and have brought to the notice of the reader some of the rules of construction with reference to the *quantity* of interest, the *property* devised, and the *person* of the devisee. It is proposed in this section to point out by what words particular estates, not before mentioned, are created.

By the common law, if a man devises to two or more persons an estate in lands, to them and their heirs and assigns forever, the devisees take an estate in joint tenancy. It was not necessary to specify the incident of survivorship, for that was inseparable from the nature of the estate. It has been shown in a previous part of this work, that the revised statutes have changed this rule of the common law, and made the estate in the case supposed a tenancy in common. If it be desired by the testator to give an estate in joint tenancy, he must expressly declare that intention in the will itself. It is usual in such cases for the testator to use language like this, viz: I give and devise to A. B. and C. D., and their heirs, such a farm, describing it, to hold as joint tenants and not as tenants in common. If it be simply devised to them and their heirs, without any words of qualification, they will take the estate as tenants in common, and not as joint tenants. The only exception to this rule, under our statute, is the case of estates vested in executors or trustees, who invariably hold as joint tenants, with all the incidents of survivorship. (1 R. S. 727, § 44.)

Under the New York statutes, if the devise be in fee tail, as at common law; as when the testator devises the estate to A. B. and the heirs of his body, or to A. B. and his issues; or when, by any words, he manifests an intention to restrain the estate to the devisee and the issue of his body; the devisee will take the fee simple by force of the statute abolishing entails, and converting them into estates in fee simple. (*Id.* 722, *revising the statute of 1786.*) It is immaterial, therefore, in determining the nature of the estate which a party derives by devise, whether the estate be such as at

common law was a fee tail or a fee simple. In either case, by force of the statute, the estate is a fee simple.

There are several material distinctions between a will and a deed. A deed operates from the time of its execution; a will only from the death of the testator. In the meantime it is said to be ambulatory. A will is revocable in its nature; but a deed is not revocable in its nature. To defeat its operation there must be a condition; or in case of a conveyance to uses, or upon trust, a power of revocation. In regard to deeds, whenever a condition is annexed to the same, the title derived under the conveyance must be considered as defeasible so long as the condition remains in force. A will may be revoked, as we have seen, by a variety of means; and again be republished and made operative. (3 *Prest. on Ab.* 181.)

With respect to the words that are necessary to make a devise conditional, it is laid down by Lord Coke, that many words in a will make a condition in law, that make no condition in a deed; as a devise of lands to an executor *ad vendendum*. So if lands be devised to one *ad solvendum*, £20 to J. L. or paying £20 to I. S., this amounts to a condition. (1 *Co. Litt.* 236 b.) Any words which in a deed create a condition, will have the same operation in a devise. Conditions are express or implied; precedent or subsequent; and whether they be one or the other depends upon the intention of the parties as expressed in the instrument. (*Nicoll v. The New York and Erie Rail Road*, 2 *Kern.* 121. *Ante*, Part 1, chapter 4.)

There is distinction between a condition and a limitation. A condition is something inserted for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate, if he will, and revest the estate in himself or his heirs. As the law does not *presume* forfeitures, it requires some express act of the grantor, as evidence of his intent to reclaim the estate, viz: an *entry*. (1 *Cruise's Dig. Greenl. ed. tit.* 13, *ch.* 2, § 64, *note* 1.)

A limitation determines the estate *ipso facto*, without entry. It is conclusive of the time of continuance, and of the extent of the estate granted; and beyond which it is declared at its creation not to be intended to continue.

Conditions render the estate voidable *by entry*. Limitations render it void, *without entry*.

If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to go to a third

person; this is a limitation over, and *not a condition*. For if a condition, an entry by the grantor would be necessary; and he might defeat the limitation by neglecting to enter.

A limitation is imperative, and is determined by the *rules of law*.

A condition not only depends on the option of the grantor, but is also controlled by equity, if the grantor attempts to make an inequitable use of it. The performance of a *condition* is excused by the act of God or of the law, or of the party for whose benefit it was made.

A limitation determines the estate *absolutely*, whatever be its nature. (*Id. note of Prof. Greenl.* 1 *Prest. on Est.* 40-59. 2 *Bl. Com.* 155, 156. 4 *Kent's Com.* 126-128.)

With regard to the charging the real estate of the testator with the payment of debts or legacies, or both, the most obvious mode is to express the intention, in direct terms. The testator may, if he pleases, make his real estate the primary fund for the payment of debts and legacies, or only the auxiliary fund for that purpose. He may bequeath and devise all his estate, real and personal, to his executors in trust to pay the debts and legacies; or he may simply authorize and empower his executors to sell his real estate, or such part thereof as may be necessary for those purposes. In the first case, the executors take the fee, and in the second a power of sale; and in both they become trustees for the purposes of the will, and they may be compelled to the execution of the trust by a court of equity.

If the will is silent on the subject, the personal estate constitutes the primary fund for the payment of the debts, and the only fund for the payment of legacies. (*Lupton v. Lupton*, 2 *John. Ch.* 614, 624.) In this state the real estate can be reached for the payment of debts, in the hands of executors or administrators, in all cases, whether they be so charged by the testator by his will or not. If so charged, the courts have power to enforce the execution of it; and if not charged, provision is made through the intervention of the surrogate's court, for making the real estate available for the payment of debts. (2 *R. S.* 100, § 1, *as amended by act of 1837. Willard on Ex'rs*, 306 *et seq.*)

When the charge is made in direct terms, there is no room for dispute or construction, and the cases need not be examined in this

place. It is only in cases where the realty is indirectly charged that there will, in general, be any difficulty.

Whether a general direction in a will by a testator that his debts shall be paid, charges the real estate with the payment, has been much agitated. The weight of authority is that such direction alone is not sufficient to charge the real estate. It means, merely, that his debts shall be paid out of the primary fund for their payment. (*Freeman's Ch. Cas.* 192. *Lupton v. Lupton*, *supra*. *Eyles v. Cary*, 1 *Vern.* 457.)

A charge is *implied* when it appears, from the whole will, that it was clearly the testator's intent that the charge should be imposed, and in no other case. (*Per Johnson, J. in Reynolds v. Reynolds*, 16 *N. Y. Rep.* 262. *Harris v. Fly*, 7 *Paige*, 421. *Warren v. Davies*, 2 *M. & K.* 49.)

The usual *residuary* clause in a will does not of itself imply that the real estate is to be charged with either debts or legacies. Nor does the blending of the real and personal estate in one devise in the same clause of the will. This subject was well considered by the court of appeals in New York, in *Reynolds v. Reynolds*, (2 *Smith*, 259.) The cases are reviewed by Bowen, J., and the result seems to be that when a testator directs his debts and legacies to be *first* paid, and then devises real estate; or when he devises the *remainder* of his estate, real and personal, *after* payment of debts and legacies; or devises real estate *after* payment of debts and legacies, the real estate is held to be charged. (*Newman v. Johnson*, 1 *Vern.* 45. *Harris v. Ingledew*, 3 *P. Wms.* 91. *Trott v. Vernon*, 2 *Vern.* 708. *Kentish v. Kentish*, 3 *Br. Ch. Cas.* 257. *Shalcross v. Finden*, 3 *Ves.* 739. *Tompkins v. Tompkins*, *Prec. in Ch.* 397. *Williams v. Chitty*, 3 *Ves.* 545. *Hassel v. Hassel*, 2 *Dick*, 527. *Brudenell v. Boughton*, 2 *Atk.* 268. *Bench v. Biles*, 4 *Mad.* 187.) So, too, where the devisee of real estate is *appointed executor*, and is expressly directed to pay debts and legacies, the charge will be created. (*Henvell v. Whitaker*, 3 *Russ.* 343. *Doe v. Pratt*, 6 *Add. & Ell.* 180. *Alcock v. Sparhawk*, 2 *Vern.* 228. *Dover v. Gregory*, 10 *Sim.* 393.)

So where a testator gives several legacies, and then, without creating any express trust for their payment, makes a general residuary disposition of the whole estate, *blending the realty and personalty together in one fund*, the real estate will be charged with the legacies; for in such a case the "residue" can only mean, what re-

mains after satisfying the previous gifts. (*Lewis v. Darling*, 16 How. 10. *Hill on Trustees*, 508. *Brudenell v. Boughton*, *supra*. *Bench v. Biles*, *supra*.) But in these cases the residuary legatee was the executor, and the gifts to him did not become effectual until all antecedent dispositions of the estate were *first* satisfied. But if the executor is not a legatee or devisee, but an indifferent person, and the residuary legatee and devisee is not expressly charged with the payment of debts or legacies, and the residuary devise is not expressed to be made *after* such payment, the prior legacies and debts are not charged. (*Myers v. Eddy*, *supra*.) The law will raise no implication in such a case to change the ordinary rule for the payment of debts and legacies.

Where the testator by his will directs his real and personal estate to be sold and converted into a common fund, charging the fund with the payment of debts and legacies, it has been held, as was said by the learned judge in *Reynolds v. Reynolds*, (*supra*), that the charge is not primarily upon that part of the fund arising from the personalty, but that the portion arising from each is charged proportionably. (*Roberts v. Walker*, 1 Russ. & Myl. 752. *Kidney v. Coussmaker*, 1 Ves. jun. 436. *Salt v. Chattaway*, 3 Beavan, 576. *Stocker v. Harbin*, 3 id. 479.)*

SECTION V.

Of Executory Devises, and of the Residuary Clause of a Will.

The subject of executory devises is nearly allied to that of contingent remainders, and has been adverted to in a previous chapter, when we were treating on that subject. (*See Part 1, ch. 6, p. 174.*)

An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation conforms to the rules regulating contingent remainders, it is a remainder, not an executory devise. This is the construction whenever a remainder is limited upon a preceding freehold. (*Doe v. Morgan*, 3 Term Rep. 763. *Wolfe v. Van Nostrand*, 2 Comst. 442.) The changes in-

* The case of *Tracy v. Tracy*, (15 Barb. 503,) was a special term decision, and was correctly decided, but upon erroneous reasons. The legacies were not charged by the *blending and combining of real and personal estate*, but by the "rest, residue and remainder" being given after the payment of debts. See remarks of Bowen, J. on this case, in *Reynolds v. Reynolds*, (2 Smith, 261.)

troduced by the revised statutes into the doctrine of future estates have made certain future estates contingent remainders, which formerly could be upheld only as executory devises. The statute has however fixed limits to the power of the owner over the disposition of his property. It has made all future estates void in their creation which shall suspend the absolute power of alienation for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in a single instance. That instance is, that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age. (1 R. S. 723, §§ 14-16.) The power of alienation is said to be suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

The effect of the statute is to destroy the distinction between contingent remainders and executory devises, which may now alike be created by grant or by will. They are made alike applicable to real and to personal property.

The questions growing out of these statutory changes have, in most instances, arisen under wills. In *Irving v. De Kay*, (9 Paige, 521,) the subject was extensively examined by the chancellor in determining various points arising out of the will of the late Henry Eckford. He stated some of the principles which had been adopted by his court and affirmed by the court of errors. He considered it settled that an estate which is inalienable for an absolute term, and which is not so limited as to be certainly determinable at the expiration of not more than two lives in being at the death of the testator, is void in its creation. He considered it also as well settled, that any legal trust is sufficient to sustain a devise or conveyance to the trustee, of an estate commensurate with such trust, without reference to other illegal trusts, which the testator or grantor has attempted to create in the same estate as distinct and separate trusts.

The intention of the testator, when ascertained from an examination of the will in connection with the situation of his property, &c. at the time of making his will, must be carried into effect by the courts, so far as is consistent with the rules of law. Although some of the objects for which a trust is created, or some future interests, limited upon the trust estate, are illegal and invalid, if any of the

purposes for which the trust was created are legal and valid, and would have authorized the creation of such an estate, the legal title vests in the trustees, during the continuance of such valid objects of the trust; except in those cases where the legal and valid objects of the trust are so mixed up with those which are illegal and void, that it is impossible to sustain the one without giving effect to the other; and that every disposition by the testator of an estate or interest in the rents, profits or income of his real or personal property, and every trust in the will which, if valid, would have the effect of rendering the property inalienable for a longer period than is allowed by law, and every remainder, or other future estate, or other interest limited upon the trust, which would have that effect, must be considered and treated as absolutely void and inoperative, in determining the question of the validity of a devise of the legal estate to trustees, or the validity of any other provision of the will. (*See Gott v. Cook*, 7 *Paige*, 521; *Van Vechten v. Van Vechten*, 8 *id.* 104; *Darling v. Rogers*, 22 *Wend.* 483; *Amory v. Lord*, 5 *Seld.* 403. *Taylor v. Gould*, 10 *Barb.* 388. *Hawley v. James*, 16 *Wend.* 61.)

The courts have held that the provisions of the revised statutes prohibiting a suspension of the power of alienation for more than two lives in being at the creation of the estate, applies as well to present as to future estates. (*Coster v. Lorillard*, 14 *Wend.* 265.) And that a limitation which may by possibility suspend the absolute power of alienation illegally, is void. (*Per Nelson, Ch. J. in Hawley v. James*, 16 *Wend.* 120.)

There are few duties more difficult to be performed by the conveyancer than the creation of future estates and trusts, in such a form as not to be in conflict with some provisions of the revised statutes. It is impossible to anticipate all objections which may arise, or to prescribe any invariable rules which will avoid all objections. The careful draftsman must examine the cases which have been decided, and see wherein the wills which were the subject of discussion were erroneous, and in what respect they departed from the statute. Those wills were prepared by learned counsel, and were drawn with much ability. They should be examined in connection with the criticism to which they were subjected, and the ultimate decision of the courts. They thus, as corrected, become models which may be safely followed.

If a will makes no valid disposition of any part of the estate, real

or personal, the property of the testator must be distributed as in the cases of intestacy. A testator may appoint an executor and testamentary guardian by a will which is invalid in every other respect. (*Bayeux v. Bayeux*, 8 *Paige*, 333.)

Distinct, independent provisions in a will, which are in themselves valid, will not be invalidated by other separate provisions which are contrary to law. But if the valid and invalid provisions are so intermingled that they cannot be separated from each other, they must all fall together. So where a particular provision, which if it stood alone would be valid, forms a part of, or depends upon a general purpose of the testator which is contrary to law, it is void. (*Hawley v. James*, 5 *Paige* 318; 16 *Wend.* 61. *Lorillard v. Coster*, 5 *Paige*, 172; 14 *Wend.* 265. *Hartun v. Corse*, 2 *Barb. Ch.* 506. *De Kay v. Irvin*, 5 *Denio*, 646, affirming 9 *Paige*, 521. *Parks v. Parks*, 9 *Paige*, 107.)

The residuary clause in a will is in general inserted to prevent the effect of an intestacy. It means, says Chancellor Kent, in *Lupton v. Lupton*, (4 *John. Ch.* 623,) that the testator does not intend to die intestate as to any part of his property, and it generally means nothing more.

There are no particular words necessary to a residuary bequest or devise. In a will disposing of both real and personal property, the usual formula is: "I give, devise and bequeath all the residue of my estate, real and personal, to A. B., his heirs and assigns, forever." This form may be varied to meet the taste of the framer of the will. In *Howland v. The Union Theological Seminary*, (1 *Seld.* 193,) the residuary clause was in this form: "As to all the rest and residue of my estate, real and personal, whatsoever and where-soever, I give, devise and bequeath the same in three equal parts, to be divided as follows," &c. This was held to be a general residuary clause, disposing of all the testator's estate of which no specific disposition was made by other parts of the will.

We have shown, under a previous head in this chapter, what becomes of a void devise, in a case where the will contains a residuary clause, (see § 3, p. 514,) and it need not be repeated.

CHAPTER XI.

OF ABSTRACTS; EXAMINATION THEREOF; SEARCHING FOR INCUMBRANCES, AND PREPARING THE CONVEYANCE; AND BY WHOSE EXPENSE.

SECTION I.

Of the Nature of an Abstract.

When land is to be conveyed by one party to another, it is, according to the English practice, the duty of the solicitor for the vendor to prepare an abstract of the title; and of the solicitor of the purchaser to compare the abstract with the deeds, wills, &c. The general practice is to produce the deeds, &c. to the purchaser's solicitor, at the office of the vendor's solicitor—whenever they are exhibited the purchaser must procure some person on his behalf to compare the abstract with the evidence of title. This assumes that the same person does not act as solicitor, at the same time, both for the vendor and purchaser. It is in general desirable in cases in any respects complicated, that each party should be represented by his own counsel or solicitor.

The object of the abstract is to enable the purchaser or his counsel to judge of the sufficiency of the title, and of the incumbrances by which it may be affected. It should, therefore, describe whatever will tend to enable the purchaser or his counsel to form an opinion of the precise state of the title, at law or in equity, together with all chances of eviction, or even of adverse claims. (*Preston on Abstracts, vol. 1, 1-5.*)

According to Mr. Preston, the general practice in England is to take the commencement of the title, so as to show the state of the evidence for a period of *sixty* years at least. And in many cases it is material to carry back the title even to a more remote period. This period of sixty years is derived from the analogy to the statute of limitations against a writ of right, which by 32 Henry 8, ch. 2, was fixed at that period. (3 *Black. Com.* 196, *Sharswood's ed.*) The application of that principle to our practice would shorten the period to *forty* years, the longest limitation in our statute. (*Code,*

§ 75. *The People v. Arnold*, 4 Comst. 508. *The People v. Van Rensselaer*, 5 Seld. 291.)

The simplicity of our law of real estate, compared with that of England, relieves us from many cases of doubt and uncertainty which often oppress the mind of their conveyancers. When the title to land has been derived directly from the state, and has been held by the vendor, uninterruptedly, till the day when he proposes to sell, it can only be necessary for the purchaser, after examining the original patent from the land office, to inquire whether the owner has in any way subjected the estate to any incumbrance by mortgage, judgment, or other lien.

Where the estate has passed through various owners, by intermediate conveyances, the case becomes more complex; and the inquiry for incumbrances must be extended so as to embrace the various persons through whom the title has passed.

If the estate has been derived by any of its owners by descent, additional questions, as to pedigree, may arise; and also whether the deceased left a last will and testament or not.

If any of the parties through whom the title has passed, derived his ownership by devise, still another class of questions will arise, either as to the competency of the testator to make a will, the conformity of the will to the statutory requirements as to its execution, the structure of the will itself, so as to pass real estate, and whether the estate devised is charged with the payment of debts or legacies, and if so, whether they have been fully paid; and whether the estate is incumbered with any claim for dower, or any other contingent right.

If the vendor, or any one from whom he derives his title, acquired the property at a judicial sale, or a sale under a judgment and execution, or a sale for taxes, the regularity and validity of those sales may be brought in question.

So also if the sale to any of the parties has been made under a power, the circumstances required to the valid exercise of the power should be stated, as far as they are material to the operation of the deed. If the deed was executed by attorney, the production of the power of attorney should be required, and evidence that the principal was alive when the deed was executed by the attorney. (1 *Sugden*, 483.)

It is obvious, therefore, that the subjects of inquiry, with respect

to the safety of a purchase, are as numerous as the sources of the original and derivative title to the estate.

We shall proceed to notice some of the necessary points to which the intention of a purchaser, or a party proposing to advance money on the credit of the property, should be directed.

SECTION II.

Of Searching for Incumbrances against the Vendor.

If the title to the estate about to be conveyed has passed through no other hands than those of the vendor after being derived from the state, it is against him only that incumbrances are to be inquired for.

There are various liens which the owner of real estate may create; but which to be available against *bona fide* purchasers, for value parted with at the time, the law requires an entry of them in some public office so as to be accessible to a reasonable search.

1. Judgments rendered by courts of record, are a charge upon the land, tenements, real estate and chattels real of every person against whom any such judgment shall be rendered, which such person may have at the time of docketing such judgment, or which such person shall acquire at any time thereafter; and such real estate and chattels real are subject to be sold upon execution to be issued on such judgment. This lien continues between the parties until the judgment is satisfied; but from and after ten years from the time of the docketing every such judgment, it ceases to bind or be a charge upon any such property, as against purchasers in good faith, and as against incumbrances subsequent to such judgment, by mortgage, judgment, decree or otherwise. (2 R. S. 359, §§ 3, 4. Code, § 282.) The code of procedure makes it a lien on the real property of the judgment debtor in the county where it was rendered, and in any other county, upon the filing with the clerk thereof a transcript of the original docket.

This statute is held to be a short limitation in favor of all purchasers and incumbrancers whose interests arise after the docket. With respect to them, whether they had notice of the judgment or not, they take the land free and discharged of the lien. (*Little v. Harvey*, 9 Wend. 157. *Graff v. Kipp*, 1 Edw. Ch. R. 619. *Tufts' Adm. v. Tufts*, 18 Wend. 621. *Scott v. Howard*, 3 Barb. 319. *Muir v. Leitch*, 7 id. 341.) But the judgment continues a lien on

the real estate as against the defendant in the judgment and his heirs, and as against the grantee of the defendant without valuable consideration. (*Scott v. Howard, supra.*)

The same principles are extended to the judgments of justices of the peace amounting to twenty-five dollars or upwards. Such judgment, on filing a transcript thereof in the office of the clerk of the county where the judgment was rendered, from the time of such filing, becomes a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, with the like effect in every respect, as in the county where the judgment was rendered; except that it is a lien only from the time of filing and docketing the transcript. (*Code, § 63.*)

With regard to judgments rendered by the federal courts, it was said by the chancellor in *Manhattan Co. v. Evertson*, (6 *Paige*, 466,) that there is no act of congress making a judgment of those courts a lien upon the lands of the judgment debtor within the general territorial jurisdiction of the court, or elsewhere. The existence of such lien, therefore, depends upon the local law of the state where the land is situated upon which such lien is claimed. This is so settled by the supreme court of the United States. (*Taylor v. Thompson's Lessees*, 5 *Peters*, 358.)

The chancellor said in the same case, (6 *Paige*, 468,) that the lien of a judgment recovered in one of the circuit or district courts of the United States within the limits of this state, is a lien upon the lands of the debtor lying within the territorial jurisdiction of such court, for the term of ten years from the docketing of such judgment, in the same manner as the judgment of a court of record in one of the state courts is a lien. But he thought that though those courts could issue executions to the marshals of other districts than that in which the judgment was obtained, the lien of the judgment upon the lands of the debtor must be confined to the lands of the state in which the court is held, and the judgment obtained.

Previous to the revised statutes of 1830, a judgment in a court of record in this state was a lien upon the lands of the judgment debtor from the time of the entry thereof, whether docketed or not. But if the judgment was not properly docketed, it does not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees. The effect of the revised statutes was to prevent

the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been actually docketed. (*Buchan v. Sumner*, 2 Barb. Ch. 165.)

The general lien of a judgment upon the real estate of the debtor is subject to all equities which existed against such real estate, in favor of third persons, at the time of the recovery of such judgment; and a court of equity will so control its legal lien as to restrict it to the actual interest of the debtor in the property, and to protect prior equitable interests in such property, or the proceeds thereof. (*Buchan v. Sumner*, *supra*. *Matter of Howe*, 1 Paige, 125. *White v. Carpenter*, 2 *id.* 217. *Kersted v. Avery*, 4 *id.* 9.)

If a judgment be duly docketed, it is notice to all the world of its existence, and a party can gain nothing by alleging his ignorance of it. (*Pierce v. Alsop*, 3 Barb. Ch. 195.) It is his duty to cause the requisite search to be made in the proper office, and to obtain the certificate of the clerk as to the facts disclosed by the docket.

We have discussed, in a previous chapter, (*Part 3, ch. 6*,) the subject of judgments against various parties, and of title under sales by the sheriff, to which the reader is referred. It will there be seen how far judgments are a lien upon the real estate of parties.

We have seen that the ordinary limitation of the lien of a judgment upon the real estate of the judgment debtor, is ten years from the docketing of the judgment. But in case the judgment creditor shall be restrained from proceeding thereon, by injunction or by the operation of a writ of error, the time during which he is so stayed constitutes no part of the ten years, if the party so delayed proceeds as directed by the act, to entitle him to such deduction. For this purpose he is required to file with the clerk of the court in which the judgment was obtained, a notice specifying the injunction or writ of error by which the judgment shall be restrained, and the time of the service thereof; and if such restraint shall have ceased, such party shall specify the duration thereof. The clerk is required to enter in the margin of the docket of the judgment a minute stating that an injunction or writ of error, as the case may be, has been issued, relating to such judgment. A copy of this notice is required to be transmitted by the clerk with his docket of judgment to the other clerks of the court, at the same time and in the same manner. (2 R. S. 359, §§ 5, 6.)

The foregoing provision was contained in the revised statutes; and the code, (§ 282,) as amended in 1851, contains a correspond-

ing provision. It enacts that whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the code, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment that the "same is recovered on appeal," and thereupon it shall cease, during the pending of the appeal, to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith.

A judgment may, in certain cases, be entered up, filed and docketed against a party who is dead, within one year after such death. A suggestion of such death, if it happened before judgment, shall be entered on the record, and if after judgment, the fact must be certified on the back of the record by the attorney filing it. Such judgment, however, does not bind the real estate which the party had at his death, but is considered as a debt to be paid in the usual course of administration. If a verdict has been rendered before the death of the party, upon which the proceedings shall be stayed by a bill of exceptions, or by any order of the court, or any officer thereof, the court is allowed to authorize the filing and docketing a record of the judgment, within one year after the death of such party, subject to the power of the court to vacate the same. (2 R. S. 359, §§ 7, 8. *Nichols v. Chapman*, 9 Wend. 452.)

With regard to the interest which a party has under a contract for the purchase of land, the revised statutes enact that it shall not be bound by the docketing of a judgment or decree, or by the issuing of an execution. In such a case, after the return of the execution unsatisfied, the creditor may go into a court of equity for the sale of the defendant's interest in the contract, for the payment of the debt. (1 R. S. 744, §§ 4-6. *Griffin v. Spencer*, 6 Hill, 525. *Talbot v. Chamberlin*, 3 Paige, 220. *Brewster v. Power*, 10 id. 562. *Approved in Garfield v. Hatmaker*, 1 Smith, 475.)

The lien of a judgment is not affected by the plaintiff binding himself not to take out execution for any time less than the ten years. (*Muir v. Leitch*, 7 Barb. 341.) But it is extinguished by a sale of the land, upon an execution issued upon the judgment. If the judgment is not satisfied in whole by such sale, it will attach

to a subsequently acquired title of the debtor. (*Russell v. Allen*, 10 *Paige*, 249.)

It will sometimes happen that the certificate of the clerk will disclose the existence of judgments against the vendor which are undischarged of record. If it be *known* that such judgments have been paid, a purchaser may with safety complete his purchase; for a judgment, after it has been fully paid and satisfied, cannot be kept on foot to cover new demands of the plaintiff. (*Troup v. Wood*, 4 *John. Ch.* 228.) Part payment on a judgment discharges the lien to that extent, and no agreement between the parties can restore it, as against third persons. (*Marvin v. Vedder*, 5 *Cowen*, 671. *De la Vergne v. Evertson*, 1 *Paige*, 181.)

The more prudent course for the purchaser, in such a case, is to cause satisfaction to be acknowledged by the judgment creditor, and to have the docket of the judgment canceled and discharged by the clerk of the court. This will be done upon the filing with the clerk an acknowledgment of satisfaction, signed by the party in whose favor the judgment was obtained, or by his executors or administrators, duly authenticated. (2 *R. S.* 362.) It may also be made by the attorney on record of the party in whose favor the judgment was rendered, within two years after the filing of the record of such judgment, in the same manner and with the like effect as if made by such party himself. When made by the attorney it is not conclusive against the principal in respect to any person to whom actual notice of the revocation of the authority of such attorney shall have been given, before any payment on such judgment shall have been made, or before any purchase of property bound by such judgment shall have been effected. (*Id.* § 24. *Benedict v. Smith*, 10 *Paige*, 126.)

The statute also provides for cases where the judgment creditor resides out of the state. In such a case, the acknowledgment of the satisfaction piece, signed by the party, or by his executors or administrators, may be taken before either of the officers before whom conveyances of real estate may be acknowledged or proved, by persons residing or being out of this state. (*L. of 1834, ch.* 262, § 1. 3 *R. S.* 640, 5th ed.) The same statute provides that in all cases of acknowledgment of satisfaction of judgment, by virtue of a letter of attorney, or other instrument containing a power to acknowledge satisfaction, such letter or instrument must be acknowledged by the party executing the same, or proved by a subscribing

witness thereto in the manner prescribed by law, before the clerk of the court in which the judgment has been rendered, or before either of the officers before whom conveyance of real estate may now be acknowledged or proved; and such letters of attorney or other instruments must be filed with such clerk, with the satisfaction piece. (*Id.* § 2.)

It is made the duty of the attorney to acknowledge satisfaction, when the judgment is paid to him, on payment of the fees by the defendant. (2 *R. S.* 362.) It is the judgment debtor alone who has any interest in having the judgment lien removed, and it should therefore be done, if done at all, at his expense.

It is the *payment* of the judgment which operates as the discharge of it. The satisfaction piece is merely the evidence to the clerk of such payment.

But the statute has also given to the sheriff's return on the execution issued upon the judgment, the effect of an authority to the clerk to enter satisfaction of record to the extent of the amount returned by the sheriff as having been collected by him on the execution; unless, indeed, such return be vacated by the court. On the return of the execution, the clerk is required to enter in the docket of the judgment, the fact that the amount stated in the return to have been levied, has been collected. (2 *R. S.* 362, § 26.)

If a judgment be reversed, vacated, or satisfied of record, the proper certificate of the clerk of the court with whom such judgment is entered of that fact under his seal of office is made sufficient authority, on being filed with the clerk of any county with whom such judgment or decree may have been duly docketed, to discharge and cancel such docket thereof. (*L. of 1844, ch. 104, § 5.* 3 *R. S.* 641, 5th ed.)

The satisfaction piece, though filed, is not a record, but a mere warrant to the clerk to enter satisfaction on the roll. (*Lowns v. Remsen, 7 Wend. 35.*)

A party having an interest in knowing the extent of the incumbrances by judgment against the owner of real estate, is thus enabled to ascertain the facts, and can pursue his inquiries as far as may be necessary for that purpose. There are, however, some cases in which the amount stated in the judgment will not disclose the exact amount due, but it gives the limit beyond which it cannot be extended. A judgment may be taken as a security for a debt already due, or advances thereafter to be made. It may be taken

as a continuing security, for advances to be made by the obligee. (*Wilder v. Winne*, 6 Cowen, 284, affirming 4 Wend. 100. *Truscott v. King*, 6 Barb. 346.) A person who has taken such security will be protected whether the arrangement appears on the face of the papers, or rests in parol. (*Id. Bank of Utica v. Finch*, 3 Barb. Ch. 293.) If after the taking of a judgment to secure an existing demand and future advances, another creditor obtains a mortgage on the same lands, after the recording of which the judgment creditor makes further advances; in such a case the question will arise as to which is to be preferred, the judgment creditor for his future advances, or the mortgage creditor who obtained his lien before the subsequent advances were made by the judgment creditor. This question has been settled by the courts in favor of the judgment creditor. The recording acts do not make the recording of a mortgage constructive notice to a prior incumbrancer, but only to such as are posterior in point of time. There is no fraud, therefore, in the judgment creditor's making subsequent advances on the faith of the judgment, unless he had *actual* notice of the intervening incumbrances; the recording of the mortgage not being constructive notice to him for this purpose. (*Truscott v. King*, *supra*. *Stuyvesant v. Hall*, 2 Barb. Ch. 151.) His equity is stronger than that of the intervening mortgagee; because as to him the judgment is constructive notice of the extent of the advances which are intended to be secured, and he must be presumed to have taken his security with reference to the whole amount of the judgment; unless there be *positive notice* when he takes his mortgage, that only a part of the money mentioned in the judgment had been advanced, and the subsequent loan of the judgment creditor was made with full knowledge of that fact.

2. Another case of general lien arises in the case of town collectors, whose official bond is declared to be a lien on all the real estate held jointly or severally by the collector or his sureties, within the county, at the time of filing the said bond in the office of the clerk of the county; and it is enacted that it shall continue such lien till its condition, together with all charges which may accrue by the prosecution thereof, shall be fully paid. (*Laws of 1823*, 400, § 26. 1 *R. S.* 346. *Id.* 826, 5th ed.) This bond is required to be executed to the supervisor of the town within eight days after the election of the collector, in double the amount of the taxes to be collected by him, and to be filed by the supervisor within six days

thereafter, with his approbation indorsed thereon in the office of the county clerk, who is required to make an entry thereof, in a book to be provided for that purpose, in the same manner in which judgments are entered of record.

If the vendor has been a town collector of taxes or a surety for such collector, a search in the county clerk's office will thus disclose the extent of the lien upon the real estate owned by them, or either of them; and an examination at the office of the county treasurer of the county will afford decisive information whether the condition of the bond has been complied with or not. Indeed, upon the settlement of the amount of taxes directed to be collected by any collector in any town or ward, (*the city of New York excepted*), the county treasurer, if requested, is required to give the collector, or to any of his sureties, a satisfaction piece in writing, and to acknowledge the same before some person authorized to take the acknowledgments of the satisfaction of judgments in courts of record. (1 R. S. 401, § 20. *Id.* 925, 5th ed.) Upon the production of such satisfaction piece, acknowledged as aforesaid, the clerk of the county is required to enter satisfaction of record of the collector's bond, which shall be thereby discharged. (*Id.* § 21.) It is therefore an easy matter to determine whether the bond, at any given time, is a subsisting lien or not.

3. Another class of general lien arises from the act for the assessment and collection of taxes. Taxes on real estate are a lien upon the same. If they are returned unpaid in consequence of the premises becoming vacant, or in default of goods and chattels of the occupant to pay them, the supervisor of the town is required to add a description thereof to the assessment roll of the next year in the part thereof appropriated to taxes on lands of non-residents, and to charge the same with the uncollected tax of the preceding year; and the same proceedings shall be had therein in all respects as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so added. (1 R. S. 925, 5th ed.) In a subsequent part of the act, it is required that whenever any tax charged on lands returned to the comptroller, and the interest thereon, shall remain unpaid for two years from the first of May following the year in which the same was assessed, the comptroller shall proceed to advertise and sell such land in the manner directed by the act. (*Id.* 930.)

The proceedings on the assessment and collection of taxes are foreign from the subject of this treatise. It is enough to know that the land tax creates a lien upon the real estate so taxed; and that an application to certain officers, the collector, supervisor of the town, county treasurer, or the comptroller, as the case may be, the extent of that lien may be ascertained, and the amount discharged.

A separate and independent provision for the sale of lands for taxes exists in the city and county of New York, under the direction of officers of the local government. An application to the comptroller of the city will probably, in most cases, afford the requisite evidence of the state of the premises sought to be bought or sold, with respect to taxes. (1 *R. S.* 967 *et seq.* 5th ed.) It is presumed that in most of the cities and in many of the villages of the state, there are local laws of taxation and assessment, affecting the real estate within their bounds. A party dealing with lands so situated can generally ascertain, without difficulty, from the local officers, whether any portion of the real estate is incumbered by taxes or assessments, and the extent thereof. It will not be attempted to collect a digest of these local statutes. Many of them are changed, from time to time, by the legislature.

4. In addition to the general liens which have been adverted to, lands are subject to *specific* liens created by the owner, by mortgage, either for the payment of money, or for the performance of covenants. Mortgages, like judgments, may be taken to secure future advances; and the same principles are applicable to them as to judgments taken in the same way. The cases which we have been considering in relation to judgments are applicable to mortgages, and need not be repeated, (*Averill v. Louckes*, 6 *Barb.* 19, 470.)

We have treated, in a former part of this work, of mortgages in general, of the recording thereof, and of the priority amongst successive mortgages. (*See ante*, p. 119.) The statute has pointed out a convenient way for the discharge of the lien of a mortgage, without any reconveyance by the mortgagee to the mortgagor. With us a mortgage is treated as security for the payment of a debt, or the fulfillment of an obligation. The mortgagor, until foreclosure, is, for most substantial purposes, treated as the owner of the land, as to all persons but the mortgagee. (*Runyan v. Mercereau*, 11 *John.* 534. *Hitchcock v. Harrington*, 6 *id.* 290. *Coles v. Coles*, 15 *id.* 319.) If, upon search, the premises attempted to

be sold are incumbered by mortgage, the purchaser will naturally insist not only that the mortgage shall be paid off, but that it shall be discharged of record. The statute provides upon what evidence the clerk in whose office the mortgage is recorded may make this entry. It is a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified in the manner therein prescribed, to entitle conveyances to be recorded, specifying that such mortgage has been paid, or otherwise satisfied and discharged. This certificate, and the proof or acknowledgment thereof, must be recorded at full length; and a reference must be made to the book and page containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof. (1 *R. S.* 761, §§ 28, 29. 3 *R. S.* 57, 5th ed.)

If the mortgage has been assigned, the assignee, it has been seen, is the party to give the satisfaction piece. The clerk cannot know, but from the assignment in writing itself, that the assignee has authority to grant the discharge; and hence it is desirable, when a bond and mortgage are assigned, that it should be done by a written assignment, proved or acknowledged in the same manner as deeds are required to be proved or acknowledged in order to be recorded. The record of this assignment will be the authority for the clerk to carry into effect the certificate of discharge by the assignee. Though this record is not constructive notice to a mortgagor, or his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee, it is doubtless notice as against persons claiming by virtue of some subsequent assignment or conveyance from the mortgagee, or assignor of the mortgage, or his representatives; (1 *R. S.* 763, § 41. *The New York Life Ins. and Trust Co. v. Smith*, 2 *Barb. Ch.* 84;) and it is notice to the clerk with whom the mortgage is recorded.

In case of the death of the mortgagee the power to give the satisfaction piece, on payment, is vested in his executors or administrators. A certificate from the surrogate's office of the county in which probate of the will, or letters of administration have been granted, showing that the party to whom it is given is the duly qualified executor or administrator of the estate of the deceased, will furnish to the clerk of the county in which the mortgage is registered the requisite evidence of such appointment; and authorize him to act upon it accordingly.

The foregoing remarks have been made upon the supposition,

that the title to the premises intended to be sold or incumbered by mortgage, have only passed through a single individual after being granted by the government. This furnishes but a small part of the cases which will arise in daily practice in the conveyancer's office. In most cases, the title will have passed through various individuals, by different conveyances. Safety, therefore, will require that a similar process of search for liens created or occasioned by the successive owners, should be pursued. The abstract will contain the deduction of title from a former owner sufficiently remote from the present period to induce the belief, that there are no subsisting liens of an earlier date; and the search for liens and incumbrances will be conducted with reference to the subsequent successive owners. In this mode alone can the premises be shown to be entirely unincumbered.

SECTION III.

Of the Examination of a Title derived by Descent, and by Devise.

1. *By descent.* If the party intending to sell or mortgage the premises in question has derived title thereto by descent from his ancestor, in addition to the inquiry whether the property has not been incumbered by him, a variety of other questions will arise and have to be investigated. These relate both to the title of the ancestor, and the right of the vendor by descent.

In making the investigation of this subject the counsel will bear in mind the law of descent, dower, wills, escheat, statute of limitations, both as they existed prior to the revision in 1830, and as they now exist. These subjects have been sufficiently adverted to under appropriate heads, and need not be repeated.

The same line of inquiry with respect to the ancestor will have to be pursued as was indicated in the last section. It may be that the purchase deed of the ancestor is sufficiently remote in point of time to be the foundation of the commencement of the examination. If, for example, he, or those under whom he claims, had been in the peaceable and uninterrupted occupation of the premises, as owner, for a period of twenty years or upwards before and at the time of his death, without any controversy as to his title; such deed followed up by continued possession, in subordination to that title, furnishes a strong presumption of its goodness. This presumption is said to be greatly strengthened if there have been frequent changes

of ownership, without any adverse claim. (1 *Prest. on Abs.* 17.) Whether it will be necessary to abstract ancient deeds, which the vendor may have relating to the title of his vendor, or whether it will be sufficient to rest upon the purchase deed alone, and to examine the title from that period, has sometimes been made a question.

To abstract all the deeds, would in many cases invite tedious inquiries and long discussions, which would answer no useful purpose to the purchaser. Mr. Preston thinks that a discretion ought to be exercised on this point.

While no substantial defect in the title ought to be concealed, by withholding the knowledge of the deeds, which may give a different complexion to it, so, on the other hand, it cannot be expected that, on mere matters of form, the vendor should furnish the means of enabling a reluctant, or over cautious purchaser, or those professional men who are more nice than wise, to treat the title as difficult or doubtful; when no one, acting with a sound discretion, would view it as attended with either doubt or difficulty. (*Id.* 18.)

If the purchase deed under which the ancestor held is sufficiently remote to exclude the presumption of any adverse claim, it will be sufficient to examine as to incumbrances created or suffered by the ancestor, or any of those under whom he claims, in the intermediate time.

It will be important to inquire whether the ancestor left a widow who has any claim of dower, and if so, whether it has been released or discharged. It will also be necessary to ascertain, in case there has been in the meantime, frequent change of ownership of the property, whether the successive vendors were married or not, and if married, whether their wives united in the conveyance in such form and by such private acknowledgement, apart from their husbands, as to discharge their contingent right of dower to the premises. (*Gillet v. Stanley*, 1 *Hill*, 121.) What is needful to be done to effect this object, has been shown in another part of this treatise.

Assuming that the vendor claims by descent from his ancestor, it is important to know that he is a legitimate heir of the former owner. This often involves an inquiry as to the validity of the marriage of his parents. By the common law of England and this country, marriage is considered in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to

ecclesiastical and religious scrutiny. In the catholic and some of the protestant countries of Europe, it is treated as a sacrament. (*Story's Confl. Laws*, § 108.) The general principle is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. (*Id.* § 113.) These principles, with their qualifications, will be found stated, with more or less fullness, by all the elementary writers.

The existence of a marriage, except in actions for adultery and indictments for bigamy, is sufficiently proved by presumptive evidence of cohabitation, or even by general reputation. (*Doe v. Fleming*, 4 Bing. 266. *Birt v. Barlow*, Doug. 171. *Morris v. Miller*, 4 Burr. 2057.)

How far a claim to dower may be affected by divorce, by jointure, or a testamentary provision in her favor, and her election, has been sufficiently shown in a previous chapter. (*Part 1, ch. 2, § 3.*)

If the vendor is shown to be a son, for example, of the intestate, it will be important to inquire, whether he had any brothers or sisters who would share with him the inheritance; and whether they have conveyed their share of the estate to the vendor, by proper instruments of conveyance, duly executed and acknowledged or proved.

It will also be important to inquire, whether there are any outstanding terms for years, created by any of the prior parties, and which are still subsisting. To make a good title in fee, they should be extinguished by a valid surrender by the tenant, unless the purchaser is willing to take the title with that incumbrance.

2. If the title of the vendor was derived *by devise*, another class of questions arise. In addition to showing the unincumbered nature of the estate of the devisor at the time of his death, which will be done by some of the modes already pointed out, it will be important to inquire as to the valid execution of the will to pass real estate, whether it has been proved as a will of real estate, and recorded in the proper surrogate's court; whether the testator has devised to the vendor the fee simple, or what other estate in the property in question; whether, by the terms of the will, the testator's debts and legacies, or either of them, have been charged upon the real estate; and whether there is still any outstanding claim of dower, affecting the premises.

We have seen, under the proper head, that a will is revocable,

and have pointed out how it may be revoked, and how restored by republication. It may become necessary to apply these principles to an actual case.

The devise under which the vendor claims may have been upon a condition. Conditions, we have seen, are of two kinds, precedent and subsequent; and we have pointed out the difference between a condition and a limitation; (*Part 3, ch. 10, § 4;*) and by what words the real estate of the testator may be charged with debts or legacies. It will be the duty of the counsel in preparing the abstract to set out such parts of the will as bear upon these questions, and sometimes an examination of the whole instrument will be necessary.

If the will has not been proved as a will of real estate, it should be done as a matter of precaution to perpetuate the evidence in relation to its execution, and to prevent the heirs at law from dealing with the estate. (1 *R. S.* 748, 749, § 3. *Willard on Ex'rs*, 170.) Though the title, derived from the will, may be enforced in the proper tribunal without the proof and recording it with the surrogate, still the latter proceeding will in general be insisted on by every prudent purchaser.

When an estate has been divided among different owners, either by descent or purchase, and the inquiry is made as to the title of one only of the present holders of it, the absence of the earlier deeds affords no suspicion of concealment; and accounts in the most satisfactory manner for the absence of the more early deeds. In this state, since the recording of deeds and other conveyances is almost universal, there is a ready mode of ascertaining the state of the title by a reference to the public records. If the seller cannot produce the original deeds or wills under which his title is held, he cannot require the purchaser to send round to the different offices to examine the abstract with the originals, or with the records, even when that will be permitted by the rules of the office, although the vendor is willing to pay the expense of the attendances; but he must procure office copies or extracts, as the case may require, in order to enable the purchaser's solicitor to examine the abstract with him, if it should be deemed necessary. (1 *Sugd. Vend.* 518, § 15, *Perkins' ed.*)

In the case of *Hughs v. Winne*, (8 *Sim.* 85,) it was held that when title deeds were in the hands of persons residing in different

parts of the country, the vendor must be at the expense of the purchaser sending a clerk to compare the abstract with the deeds.

The rights of the parties are sometimes regulated by the stipulations of the executory contract of sale. When the seller, in the conditions of sale, agrees to deliver an abstract of title and deduce a good title, he is bound to perform the agreement. If he intends to deprive the purchaser of the right to the production of any evidence necessary to verify the title beyond what the title deeds in his own custody will supply, he is bound to make that intention previously known to the purchaser in clear and explicit terms. (*Southy v. Hutt*, 2 *Myl. & Cr.* 207.)

The questions of this nature most frequently arise in actions for the specific performance of contracts for the sale or purchase of real estate. The court will not decree a specific performance where the vendor cannot make a clear and undoubted title to the premises, unless the purchase has been made at the risk of the vendee as to the title, or the latter has agreed to accept such title as the vendor was able to give. In general, however, it is not necessary for the complainant to show that he was able to give a good title at the time of making the agreement to sell, or even at the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree. (*Brown v. Huff*, 5 *Paige*, 241. *Langford v. Pitt*, 2 *P. Wms.* 630. *Clute v. Robinson*, 2 *John.* 595. *Coffin v. Cooper*, 14 *Ves.* 205. *Seymour v. Delancy*, 3 *Cowen*, 445. *Dutch Church v. Mott*, 7 *Paige*, 77.) This, too, is a good answer to the bill of the vendee to rescind the contract. For though the vendor may not have been able to convey at the time he made the contract, or at a later day when the vendee called for performance, yet if he can give a good title at the time of the decree, the complainant must accept it; but in that case he will be entitled to an equitable compensation for the delay. (*Pierce v. Nichols*, 1 *Paige*, 244.)

Equity sometimes decrees the execution of an agreement, with a compensation for defects. The vendor must himself, when he seeks relief against a vendee, be able to perform on his part. A mere trifling, immaterial defect, will not defeat a decree. If the defendant obtain by a performance the same title which he expected to obtain when he made the contract, a performance will be decreed. (*Winne v. Reynolds*, 6 *Paige*, 407.) It was said by the chancellor in the last cited case, that the reservation of a pepper corn rent, or

any thing else which is merely nominal, is not an objection to the title which could justify the court in refusing a specific performance, even where the defendant had contracted to purchase without any notice that such nominal rent was reserved.

The foregoing observations show the importance of care in preparing the preliminary contract. The vendor should not stipulate to give any different title from that which it is in his power to convey; and the vendee should be apprised of the nature of the title, and of its defects, if any, when he completes the executory contract. For although a court of equity may overlook trifling defects which have not been enumerated in the contract, yet the existence of such defects often give rise to distressing litigation, and may affect the question of costs, if they be not sufficient to break up the agreement altogether. Such controversies can be avoided by a reasonable precaution in the beginning.

Courts of equity do not entertain an action for a specific performance of a merely *gratuitous* promise. It never decrees, specifically, a mere *voluntary* agreement. (*Jackson v. Ashton*, 11 Pet. 229.) But in all cases where specific performance of a contract would be granted between the original parties, it will be decreed between all claiming under them, if there be no intervening equities to control the case. (*Hays v. Hall*, 4 Porter, 374.)

SECTION IV.

Of the Examination of a Title acquired under a Judicial Sale, or Sale under a Power.

When a party has acquired a title to real estate, at a sale under a judgment and execution; or a sale of lands for taxes; or a sale of lands under an order of the surrogate, for the payment of debts; or the sale of lands of infants or lunatics under the authority of some tribunal, and is desirous of selling or mortgaging the same, his abstract of title should show, at least, in a general way, the nature of his title. We have treated in a previous chapter, of titles so acquired, by reference to which the reader will discover what is requisite to a complete title, and in what manner it can be assailed. (*See ante*, p. 445.)

The purchaser, if apprised fully of the particulars of the vendor's title, will regulate the price he is to give by the probable risk of a controversy about the subject of his purchase.

The points to which the inquiry should be directed, in investigating the validity of title acquired at judicial sales, are as various as the nature and occasion of such sales.

If the sale be by virtue of a judgment and execution, the prominent point to be examined is as to the title of the judgment debtor, at the time the judgment under which the purchase was made became a lien upon the land; that is, at the time the judgment was docketed. The mode of conducting that investigation has already been indicated. It is the same as if the purchase was made directly from him by a deed of bargain and sale, and his ability to give an unincumbered title was in issue. Whatever title he had at the time of the docketing of the judgment will pass to the purchaser, and may be acquired by a redeeming creditor. The judgment, execution and sheriff's deed will be *prima facie* sufficient evidence of title of the party claiming under such sale. The abstract should set out not only the deed but the judgment and execution. It will then be for the other party to show that the judgment had been paid, or that the execution or judgment or both were void, at the time of the sale. It will not be enough to show that the judgment was *erroneous*, or that the execution was irregular merely. A reference to the sixth chapter, *supra*, will show what will be necessary to defeat the title, and what not.

In like manner, should the title have been acquired at a sale of the estate of infants, by order of the court, or at a sale of the real estate of a testator or intestate under the order of the surrogate, the jurisdiction of the court, in both cases, to make the order, may be disproved, and the sale thus shown to be invalid. Enough has been said in the chapter already referred to, on the subject of this class of sales, to enable the party who sustains, as well as the party who assails them, to understand the principles on which they rest.

So, also, should the title be derived from a sale under a power of attorney, the power itself must be produced or accounted for, and it must appear that he who granted the power had the right to do the act which the trustee is sought to be empowered to do. (*Selden v. Vermilyea*, 3 *Comst.* 525.) These powers are frequently conferred on an executor by the will of the testator. They are a trust and confidence which cannot be delegated. (*Berger v. Duff*, 4 *John. Ch.* 368.) They must be strictly pursued. And a power given to an executor cannot be executed by an administrator with the will annexed. (*Conklin v. Egerton*, 21 *Wend.* 430.)

A title derived from a sale of lands for taxes, is often rendered invalid by matter *dehors* the deed of the comptroller. It is of no validity, if the taxes were in fact paid to the collector, before the sale. (*Jackson v. Morse*, 18 *John*. 441.) Under the revised statutes, the comptroller's deed will not pass title to any portion of the premises, if a single foot of it be actually occupied at the time, unless the title be perfected by the notice, default to redeem, and the proof thereof to the comptroller, and his certificate. (*Burt v. Davison*, 16 *Wend*. 550. *Leland v. Bennett*, 5 *Hill*, 286. *Smith v. Sanger*, 3 *Barb*. 360.)

The reader is referred to the seventh chapter, part three, already cited, for the rules of law applicable to the alienation of real estate by the order or permission of some tribunal or public officer. He will there see what circumstances are essential to a valid transfer of property, and how far the title may be affected by irregularities. It is not deemed expedient to pursue this branch of the subject further, in this connection.

SECTION V.

Of the Right which a Purchaser has to the Original Deeds, and of Covenants for their Production.

It was held, in Lord Burkhurst's case, (1 *Co*. 2,) that if a man seised of lands in fee simple, and having divers evidences and charters, some containing warranty, and some not, conveys the land over to another without any warranty upon which he may be vouched, the purchaser shall have all the charters and evidences, as well those which comprehend the warranty, as the others; for inasmuch as the feoffor had conveyed over all his estate in the land absolutely, and is not bound to warrant the land, so that he cannot be vouched to warranty, and to render the value, but the feoffee is to defend the land at his peril; it is therefore reasonable that the feoffee, for his better defense, shall have all the charters and evidences as incident to the land, although they be not granted to him by express words; and that the feoffor shall not have them, because he can receive no benefit by keeping them, nor sustain any damage by delivering them.

But where a man conveyed with warranty, he had a right (unless there was an express grant of the deeds) to retain all evidences which contain warranty, or serve to protect the warranty para-

mount, or to maintain the title of the land; but not such as concern the possession. So where a conveyance was made with a warranty against the grantor and his heirs only, the purchaser was entitled to the deeds without an express grant of them; for, as he could not recover in value upon this warranty in case of eviction by a stranger, the defense of the title was at his peril. (1 *Coke Litt.* 6 a.)

This doctrine was made subservient to the interests of the parties. If a man enfeoffed two, to them and their heirs, and gave the ancient charters to one of them and he died, the survivor should have all the charters, and not his heir, to whom the gift was made; for he could sustain no loss from the want of them, nor receive any benefit by them if he had them; but it is otherwise of the survivor; and he should have them as things which went with the land.

These principles owed their origin to the doctrine of warranty; but though that has gone into disuse in England, and has been abolished in this state, these principles continue substantially the same. The title deeds are things which go with the inheritance, descend with it, and pass with it by conveyance without being named. (1 *Sugd. Vend.* 523, *Perk. ed.* *Austin v. Croome*, 1 *Carr. & Marsh.* 653. 3 *Ves. jun.* 226.)

There can be no doubt in the application of these principles to modern conveyancing, that where a man conveys the whole lot of which he has the title, by a conveyance in fee, without any covenants of warranty, the title deeds should be given to the grantee, as an incident to the grant. The grantor has no longer any interest in them; but they may be of essential value to the grantee, to protect his title against adverse claimants.

But where a man sells only a part of the estate, and retains the balance himself, the purchaser is not entitled, as an incident of the grant, to the possession of the deeds, unless they are expressly granted to him by the terms of the deed. (*Yea v. Field*, 2 *Term Rep.* 708.)

So where lands held under one title are sold to two or more persons, in separate parcels, the deeds, at common law, are usually granted to him who takes the largest part; but in all cases where a person cannot obtain the evidences, he is entitled, at the expense of the vendor, unless it is stipulated expressly to the contrary, to attested copies of all such as are not of record. (*Boughton v. Jewell*, 15 *Ves.* 176. *Dare v. Tucker*, 6 *id.* 460.) He is also entitled

to a covenant from the vendor, or the person having the larger part of the estate, to produce the deeds themselves, in order that the purchaser may be enabled to defend his title and possession. Although the purchaser of part of the estate takes such a covenant for the production of the deeds, yet, if he afterwards obtain possession of them, no person can recover them from him who has not a better right to them than he has. (*Yea v. Field, supra.*)

There is great inconvenience in having the title-deeds, says Lord St. Leonards, (1 *Sug. Vend.* 526, *Perk. ed.*,) in the hands of a seller who has parted with the whole of the property, although he has covenanted to produce them, for the obligation is soon forgotten or disregarded, and the deeds accordingly are in danger of being neglected or destroyed, unless by being sometimes called for, they produce emolument in the hands of a solicitor.

The statute relative to the recording of conveyances has relieved our conveyancers from some embarrassments which formerly existed. The revised statutes of 1830 require that all conveyances of real estate within this state, thereafter made, shall be recorded in the office of the clerk of the county where the land is situated, and when not so recorded, they are declared to be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. (1 *R. S.* 756, § 1.) This statute is a mere revision of the act of 1788, and the subsequent enactments on the same subject. (2 *Greenleaf*, 99. 1 *K. & R.* 478. 1 *R. L.* 369.) An unrecorded deed has always been good, and still is valid against the grantor and his heirs. (*Jackson v. West*, 10 *John.* 466, *per Kent, Ch. J.*) The present statute is mandatory as to all deeds thereafter made, and it holds out inducements to the recording of them which practically makes the usage of recording universal. A transcript of a duly recorded deed is an original by statute for all the purposes of pleading and proof. (1 *R. S.* 759, § 17. *Clark v. Nixon*, 5 *Hill*, 36. *Dumfrey v. Tyler*, 3 *Duer*, 73, 95.)

It would seem, in this state, that a covenant to produce the original deeds cannot be necessary in any case. If the deed has not already been recorded, the purchaser will doubtless insist on its being recorded at the expense of the vendor, in the proper county, if it has been duly proved or acknowledged; and in cases which re-

quire it, deposited in the same office, for the inspection of all persons desiring to examine the same. (1 *R. S.* 761, §§ 30-32.)

A deed duly acknowledged is evidence, not only of a transfer of the title, but of the covenants contained in it. (*Morris v. Wadsworth*, 17 *Wend.* 103.) In order to be evidence, the transcript of the record must include the whole of it—that is, the record of the proof or acknowledgment as well as of the deed itself. (*Per Bronson, J. in Morris v. Keyes*, 1 *Hill*, 540.)

The counsel for the purchaser will see that the deeds under which the grantor derives his title have been legally proved or acknowledged, and recorded in the proper county. The custody of the originals becomes then a matter of subordinate importance; but I believe it is usual, when the whole land covered by the deed is conveyed, without covenants, to deliver to the grantee the muniments of the grantor's title. But when a grantor conveys with covenant of seisin, he is not bound to deliver the title deeds to the grantee. (*Abbott v. Allen*, 14 *John.* 248.) And the learned judge who delivered the opinion of the court in the last case, expressed the opinion that the grantor, who had given a covenant for quiet enjoyment and general warranty, is in the same condition, and may retain in his own hands the evidences of his title.

This rule is not therefore confined to covenants which run with the land, as a warranty, but extends to such as do not, as the covenant of seisin, and the power to convey, and the covenant against incumbrances, which are broken the moment they are made. (*Greenly v. Wilcox*, 2 *John.* 1. *Dimmick v. Lockwood*, 10 *Wend. Rep.* 142.)

The same principles are applicable to cases where the title is derived by devise. The devisee is not, by virtue of his devise, entitled to the custody of the will, or of any certificate or other muniment of title from the executors or the heir. He is entitled to have the will, under which he derives his title, proved in the proper court, as a will of real estate, and recorded with the proofs thereof, in the book provided for that purpose. He has a right to institute that proceeding himself against the heirs, executors or other parties having an interest in the question; and can thus have the validity of the will established by judicial authority. (*L.* of 1837, *ch.* 460, § 4. 3 *R. S.* 146, 5th ed. *Willard on Executors*, 167-174.)

The exemplification of the will alone, without the proofs, cannot be received in evidence. The whole record, including the proofs,

must be certified. The record itself is made evidence, and this the court say includes the proof as well as the will. The transcript of the record, certified by the proper officer and sealed with the seal of the court, is also as effectual as the original will would be if produced. (*Morris v. Keyes, supra.*)

But though the record and the transcript thereof are both made legal evidence, they are not conclusive, but only *prima facie* evidence of the authenticity of the will in the one case, and of the deed in the other. The instrument may still be assailed by contrary proof. (*Id. Jackson v. Rumsey, 3 John. Cases, 234. 2 R. S. 58, § 15.*)

It is not usual in this state to insist on a covenant from the vendor to produce the original deeds or will, when the same have been recorded. Such requirement would be vexatious to the one party, without being attended with any benefit to the other.

A good title may sometimes be made to an estate, although the origin cannot be shown by any deed or will. But it must be shown that there has been such a long, uninterrupted possession, enjoyment and dealing with the property, as afford a reasonable presumption that there is an absolute title in fee simple. (*Cottrel v. Watkins, 1 Mason, 363.*)

In many of the cases, when a title has become perfect by adverse enjoyment, the owner can show no documentary evidence which would in the beginning have been accepted by a purchaser as a valid title. The acquiescence of all adverse claimants is presumed by lapse of time. The increased value of the property, by the growth of the country or the industry of the occupant, are constantly strengthening a title, which perhaps began in wrong; until at length it ripens into a right. The statute of limitations, as well as the principles on which the doctrine of title by adverse enjoyment rests, is founded in wisdom. And it may be doubted whether society could continue to prosper without it. It imparts to good faith and honest industry a promise of protection; and thus holds out inducements to make improvements which would otherwise be neglected. (*See ante, pp. 351, 352.*)

SECTION VI.

Of the Form, Arrangement and Substance of the Abstract.

The form of the abstract has reference not only to its mechanical execution, but the lucid arrangement of its different parts. As the object is to communicate accurate information on the subject of the title under investigation, it should be so made as to be easily examined, and readily understood. It should be drawn or engrossed in a fair hand, on good paper, so that no time need be wasted in deciphering its meaning, or arranging the order in which the different parts are stated. The parts of the deed, or will, under which the title is claimed, should be stated truly, and in the language of the instrument abstracted. The lines should be sufficiently open to give room for interlineations if need be, and the margin sufficiently broad to admit of notes of inquiry by the counsel who is employed to examine it and investigate the title. If the title be complicated, the counsel will need the whole powers of his mind, to combine the different parts, and to bring him to a safe result. Sometimes the abstract is accompanied with full copies of the deeds and wills under which it is derived. In some cases it is presumed that such copies may be important; but if the abstract be faithfully made, they will not be indispensable.

Every abstract should have a head or title. It should disclose the name of the person whose title is to be considered, the interest he has in it, the lands to which attention is to be directed, the name of the town and county in which it is situated, and if there is any difference between the ancient description of it, and that by which it is now known, the abstract should so connect the two as to show the identity of them.

The form given by Mr. Preston in his treatise, (1 *Prest. on Abs.* 36,) may be adopted by so varying the phraseology as to conform to our style of description.

It may be to this effect: "An abstract of the title of A. B. to the fee simple or inheritance of a farm of 160 acres of land, in the town of Saratoga Springs, in the county of Saratoga and state of New York, being in the allotment of the patent of Kayaderosseras, so called."

The heading of the abstract should be varied in point of form, as circumstances may require; thus directing the attention to those points which are most material and prominent.

The abstract is like a brief of facts prepared by counsel for the trial of a cause, the object of which is to establish or defend the title. In the case where lands are situated in an old patent granted more than a hundred years ago, it is unnecessary and perhaps unwise, to begin the abstract with the granting of the patent, by the colonial government, and then to trace the title under examination through the partition of the patent among the original patentees, and the subsequent conveyances by deed or will, or descents, to the party whose title is under examination. If the party from whom he purchased, or those under whom he claimed, had been in the peaceable and quiet possession of the premises, claiming as owner for many years before—twenty, thirty, or forty, as the case may be—that fact should be stated.

It may be stated thus: C. D. under whom the said A. B. derives title, went into possession of the premises in question in 1820, under a deed in fee simple from E. F., who claimed to be, and was believed to be, the owner thereof. The deed of E. F., in which his wife joined, to the said C. D., was dated the 1st April, 1820, purports to be for the consideration of 1000 dollars in hand paid, and “grants, bargains, sells,” &c., (using the granting words of the deed,) the premises in question to the said C. D., his heirs and assigns forever. It contains the usual covenant of warranty; (state what the covenants were;) it was duly acknowledged by the grantor, and his wife on a private examination apart from her husband; and was recorded in the clerk’s office of Saratoga county on &c. in book of deeds letter -- &c. page --- The said C. D. immediately afterwards entered into the possession of the said premises under the said deed, erected fences and buildings on the premises, and improved the farm, claiming it as owner until the year 1845, when, for the consideration of 4000 dollars, he sold the same to the said A. B. in fee simple, by a deed executed and acknowledged by himself and wife, bearing date 1 March, 1845, by which for the said consideration of 4000 to him in hand paid, they “granted, bargained, sold,” (follow the language of the deed,) the said described premises to the said A. B. his heirs and assigns forever. The deed

contains the following covenants of title, (setting them out,) and is recorded, (state where and when.)

The said A. B., immediately after the delivery of the said deed, entered into the possession of the said premises under said deed, and has continued ever since in the peaceable and quiet possession thereof as owner, cultivating the farm, and otherwise improving the said premises.

The certificate of the county clerk of the county of Saratoga shows that he has searched the docket of judgments in his office for the last ten years, and finds no judgment now in force against the said A. B.; and that he has searched the record of mortgages for the last twenty years, and he finds no mortgage either against the said A. B. or the said C. D.

The foregoing makes as clear a title as is usually conveyed in the country. If the purchaser is dissatisfied with it, he should point out the defects, so as to give the vendor an opportunity to explain or remove them. If, for example, the vendor had been town collector, or a surety for such collector, the purchaser might require a certificate from the clerk that the docket of the collector's bond had been discharged. (*Ch. 11, p. 535.*) So also with regard to other possible liens, for taxes, or the like, the purchaser might make inquiries and protect himself by proper covenants.

The foregoing abstract will serve only to show, in a general way, how it should be prepared.

But there will often be incumbrances to be removed. There may have been many transfers of the property. To some of the deeds the wife of the grantor may not have been a party, thus leaving the lands liable to a contingent right of dower. Some of the changes may have been occasioned by a devise. It may be important to see whether the will was properly executed to pass real estate; whether it has been proved and recorded in the proper office; whether it charged the payment of debts or legacies on the real estate of the testator, and whether those debts and legacies have been paid; whether there is any contingent right of dower or curtesy in the land or in any part of it.

The title to some of the parties may be derived by descent from a remote ancestor. In this case it may be necessary to accompany the abstract with a pedigree, duly authenticated. In the case of ancient titles this is sometimes attended with difficulty. We have only to look into our reports to see cases where titles have been

traced back for more than a century, to witness the draft upon the ingenuity and skill of the counsel who is employed in the investigation.*

Conveyancing is both a theory and an art. The theory has reference to the knowledge of the doctrine of estates, the quantity and quality of the interest which a vendor may have at a given time, and his right to alien the same. To acquire this theory, the student should make himself familiar with the law of real property as it existed in this state before the revolution, when a large portion of our great estates had their origin, the changes which have been from time to time introduced by the legislature, and the present state of the law, both of descent and purchase.

The first changes which were introduced after the revolution were the converting of estates tail into estates in fee simple, and abolishing the law of primogeniture. These led to subordinate changes, which have been noticed in the foregoing work. But still greater changes in our legal polity were wrought by the revised statutes of 1830; some of which were merely formal, and others radical in their character. Many principles in the law of trusts, for example, which were well settled, have been entirely subverted; and new rules have been adopted, the practical operation of which has not yet been fully settled by the courts. In the preceding chapters we have endeavored to state the existing law of this state, as it was enacted by our legislature and expounded by our judicial decisions. A competent knowledge of the law in these respects is indispensable to the theory of conveyancing.

But conveyancing is not only a theory but an art. The art consists in the proper application of the principles to the actual affairs of life. When a man is about to convey a farm to another, or to mortgage it as security for a loan or a debt, the natural inquiry which will first be made is as to the *quantity* and *quality* of interest which he has in the property which he proposes to alien. The first,

* The Livingston and the Van Rensselaer manors, the Hardenbergh and the Kayaderosseras patents, have each, in turn, furnished examples of the various points which may arise in deducing titles from the remote patentees. These patents embraced large tracts of land, and were issued by the colonial government in the early part of the last century. Numerous other of the old colonial patents have not been less prolific in affording subjects of litigation. (*The People v. Van Rensselaer*, 5 *Seld.* 291, will show the deduction of title in the defendants as against the state. *Papers in relation to the Livingston patent* will be found in 3 vol. *Doc. His. N. Y.*, 611 *et seq.* *Jackson v. France*, 10 *John.* 428, as to a title under the Hardenbergh patent.)

that is, the *quantity* of interest, has reference to the *time* of its continuance; as whether it is an estate in fee simple, for life or for years; an estate at will, or only at sufferance. The second, that is, the *quality* of the estate, has reference to the time when the right of enjoyment will commence, or rather whether it is an estate in possession, or in expectancy, as a remainder or reversion; and to the number and connection of the tenants, as whether it is an estate in severalty, joint tenancy or in common. These subjects have been treated in their proper place. It is obvious that these points must be settled before the conveyancer can determine on the appropriate form of conveyance, and the proper covenants to be insisted on by a purchaser, or to be granted by the vendor.

For example, if the grantor has not alone the right of alienation but only in conjunction with others, who are co-tenants with him; if he has only an estate for life or years, and another has the remainder or reversion in fee; if a husband is seised only in right of his wife; in all these cases, it will readily occur to the counsel that the proposed grantor can only transfer to another such estate as he has in himself individually; and that to alien the fee simple, he must procure the concurrence of his co-tenants, the remainderman or reversioner, and in the last case of his wife, to unite with him in the conveyance. Indeed, in all cases where a man parts with an estate of inheritance, intending to give a fee simple absolute, without incumbrances, his wife should be a party with him to the conveyance, and should make the requisite acknowledgment. (*Gillet v. Stanley*, 1 Hill, 121.)

If the tenant for life sells to a stranger in point of estate, the deed can operate only to pass his own interest, and will make his grantee a tenant *pur autre vie*. Although the grantor thus transfers to another an estate for the life of the grantor, it becomes, in the hands of the grantee, by operation of law, an estate, not for the life of the grantee, but of the grantor. It is of less value to the grantee, in point of interest, than it was to the grantor. But if the conveyance of tenant for life be to him who has the immediate estate in remainder or reversion, the operation of the deed is a surrender, and thus the whole fee simple is vested in the grantee.

Suppose an estate for years be desired to be created by a party who has only an estate for his own life. A lease for years by the tenant for life does not give a certain continuance of the estate, since it must be determined by the death of the lessor. But if he

who owns the remainder in fee joins in the lease to the tenant for years, this lease becomes during the continuance of the life estate, the lease of the tenant for life and the confirmation of the remainderman. But after the determination of the life estate, the lease becomes, in construction of law, the lease of the remainderman, and the confirmation of the tenant for life.

If the estate is derived by devise or descent, and the will, in the first case, does not charge the estate with the payment of debts or legacies, still in both cases, under the operation of our laws, the real estate of the testator or intestate may be reached through the intervention of the surrogate's court, for the payment of the debts of the testator or intestate, on the insufficiency of the personal assets, if the application be made within three years from the date of the letters testamentary or of administration. (*See Will. on Ez'rs*, 306 *et seq.* 2 *R. S.* 100. 3 *id.* 186 *et seq.* 5th ed.) The effect of this statute regulation is to create a *quasi* lien on the real estate of the deceased, in favor of creditors at large, for a certain defined period. The existence of such power will suggest to the purchaser of estates derived by inheritance or by devise, the necessity of ascertaining from the surrogate's office, or other sources of information, whether the accounts of the administration of the estate have been closed or not; and whether any and what debts exist against the estate. The covenant against incumbrances should, in the case of a title so derived, be drawn in such a manner as to protect the purchaser against the claims of the creditors of the estate, which may be enforced against the real estate of the deceased.

It is the duty of the counsel of the purchaser to examine the abstract, and compare it with the several documents referred to in it. He should see not only that the abstract has been truly made from the deeds or wills, under which the title is derived, but should ascertain by an examination of the whole instrument that there is no proviso, or limitation over, which qualifies or restricts the portion of the instrument abstracted. And the description of the parties, or an exception in the operative part of the deed, or frequently in the covenants for title, sometimes points to incumbrances or settlements which have not been disclosed. In the case of wills, particularly, the counsel is bound to read through the whole will. Upon him devolves the duty of seeing that the evidence is what it purports to be, and that the deeds and wills are duly executed and recorded. (1 *Sugd. Ven.* 505, 506, *Perkins' ed.*)

Lord Hardwicke, at an early day, laid it down, "that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in equity; to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor." Lord St. Leonards, adopting the above, adds, that it seems clear that relief may now be obtained at law. And he says that the same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can seldom happen that the attorney or agent of the purchaser is consulant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is to avoid expense. (1 *Sugd. Ven.* 8, *Perk. ed.*) This practice prevails to a great extent in this state; and in small transactions in the country is almost unavoidable. It is a practice discountenanced by the courts in England; and is often productive of the most serious consequences. (*Id.* 6 *Ves.* 631, *note.*) It would doubtless be discountenanced here. It often happens, that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now, notice to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself; and therefore, if the attorney knows of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence. (1 *Sugd. Ven.* 8, § 23, *Perk. ed.* *Champlin v. Layton*, 6 *Paige*, 203. *Griffith v. Griffith*, 9 *Paige*, 315. *Will. Eq. Jur.* 249, *et seq.* and cases there cited.)

As the principal is civilly responsible for the acts of his agents, (*Doe v. Martin*, 4 *D. & G.* 39, 40,) if the vendor of an estate is guilty of fraud in the sale of the estate to which his attorney is privy, the purchaser, if he has employed the same attorney in negotiating the purchase, though innocent of the fraud, will be affected by it. (See 1 *Sugd. Ven. Perk. ed.* 9, a variety of cases on the subject.)

It is for the interest of both parties that they be represented by different counsel, in all transactions of the nature we are consider-

ing. In England, whenever in a proceeding before a master the same solicitor is employed for two or more parties, such master may, in his discretion, require that any of the said parties shall be represented before him, by a distinct solicitor, and may refuse to proceed until such party is so represented. (*Gen. orders*, 23 Nov. 1831, 77) This rule was dictated by a knowledge of the inconvenience and hazard of the contrary practice.

SECTION VII.

Of the Party by whom the Deed or Mortgage is to be prepared, and at whose expense.

When the property of an individual is taken under the exercise of the right of eminent domain, for public use, by virtue of the sovereign authority as permitted by the constitution—that private property shall not be taken for public use without just compensation—the expense of the proceeding is borne exclusively by the party for whose benefit the property is taken. The party whose title is forcibly wrested from him is required to be recompensed in money for its value, without any deduction for supposed benefits, and without any liability for costs. This is the principle on which our laws with respect to public and private ways are founded. (2 *R. S.* 394 *et seq.* 5th ed.) The like principle applies when land is taken for a turnpike, (*Id.* 480 *et seq.*) or for a plank road, (*Id.* 495 *et seq.*)

The general act to authorize the formation of rail road corporations (*L. of 1850, ch. 140, § 16, 17, 18, &c.*) is founded on the same principle; and we have seen, in a former part of this work, that compensation must precede the vesting of the title in the company or the individual for whose benefit it is obtained. The same rule has invariably been pursued by the state in awarding damages for property taken for our canals. The state defrays the expenses of the tribunal by whom the damages are awarded.

In the foregoing provisions it is assumed that the parties taking the land of others for public use have been unable to make an amicable purchase; and the property is therefore taken against the will of its owner. But it often happens that the owner is willing to part with his title for a fair equivalent. In such a case it is usual for the purchaser to bear the whole expense of the conveyances. The rule in England, in this class of cases, seems to be the same. (*Matter of London and Greenwich Railway Co.* 3 *Hare*, 22.)

In transactions between buyer and seller, when no statute intervenes, the parties may make such stipulations as they please with respect to the expense of investigating the title, and preparing the instruments of conveyance. The expense may be equally divided, or be borne by either party, as they shall have agreed. When there is no previous agreement between the parties on this point, the matter of expense attending the conveyances is to be settled by the general usage of the country.

With respect to a mortgage given, as the security for a loan, it was said by the master of the rolls, in *Kennedy v. Greene*, (3 *Mylne & Keene*, 699,) that the solicitor of the mortgagee is the person who is to prepare the security. The money advanced is that of the mortgagee, and it is his interest that is to be protected. The expense of preparing the security and of making the requisite searches and abstracts when necessary, must be borne by the mortgagor. This it is believed is the usage in this state, where sums of money are loaned out by corporations or individuals on mortgage security. The lender is entitled to his money loaned and the legal interest, which he would not get if he had to bear the expenses of the searches, examination of titles and preparation of the securities.

When a mortgage is given for the consideration money, on the same land which is sold, no abstract of title or search for incumbrances against the mortgagor are necessary. No incumbrance against the vendee will attach upon an instantaneous seisin which is immediately conveyed back to the vendor by way of mortgage. (*See ante*, p. 124.) In this class of cases it is usual for the parties to share the expense; the vendor paying for the preparation of the deed and for the search for incumbrances on the estate, and the vendee for the bond and mortgage given for the whole, or some part of the purchase money. In transactions of this kind in the country, the same person usually acts as counsel for both parties. The purchaser should, for his own safety, require a search for incumbrances against his vendor, and those under whom he holds, and not rely solely on the covenants for title in his deed.

In other cases between vendor and vendee, the duty of preparing the title papers, and of paying the expenses incidental to their preparation depends on the express contract of the parties; and if that is silent, on the general usage on the subject. It is competent for the parties, in the preliminary contract for the sale and purchase of an estate, to stipulate by which of the parties the expenses shall

be borne. If the articles of agreement be judiciously framed, and the parties have thereby provided as to subsequent expenses, no controversy in that respect will probably arise.

But in many cases a sale takes place without any preliminary articles of agreement, or if one be made, it may fail to contain any certain disposition of this question. In such cases resort must be had to the usage on the subject, or the construction of the defective provisions contained in the contract.

The *former* practice in England was to require the vendor to prepare and tender a conveyance of the premises to be sold, when there had been no express stipulations to the contrary. The *modern* rule is admitted at this time, says Lord St. Leonards, to be that the expense of the conveyance must be borne by the purchaser, unless there has been some different express stipulation on the subject. (1 *Sugd. Vend.* 309, *Perk. ed.*) Therefore, when there is no such stipulation, the purchaser is bound to tender the conveyance. (*Id.*)

The usage in this state is believed to be more nearly like the *former* rule in England, than that which is said now to prevail there. In *Connelly v. Pierce*, (7 *Wend.* 131,) Savage, Ch. J. after admitting that in England the purchaser is bound to have the deed drawn and presented to the vendor for execution, says we have not gone so far. "The party who is to give the deed, should have it drawn at his own expense." On this point it is believed the supreme court in the fifth district, agreed with the former chief justice. (*Carpenter v. Brown*, 6 *Barb.* 149.)

In most of the cases in this state, the question as to who is bound to prepare the deed, has arisen in a collateral action. In *Connelly v. Pierce*, (*supra*,) it arose in an action of covenant upon a contract for the sale of land, alleging as a breach that the defendant refused to convey, although requested, &c. There were several pleas to this breach. In the course of the case it was held that the vendor who has covenanted to convey by a certain day, is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, *has made a second demand*. The purchaser, it was conceded, might avoid the necessity of a second demand by tendering, on the first demand, a deed prepared for execution. It was said that the vendor was to be at the expense of having it drawn, but was not, in such a contract as that was, to

have it prepared until demanded. The supreme court, in *Carpen-ter v. Brown*, (*supra*,) question the necessity of a *second demand*. They thought that if the party was entitled to the deed when the demand was made, no second demand was necessary.

In *Fuller v. Hubbard*, (6 *Cowen*, 13,) the question arose in an action of assumpsit by the purchaser to recover back the money paid, the conveyance not having been given. The plaintiff having recovered, a motion was made for a new trial, first, on the ground that the plaintiff could not sue on the common counts, but should have brought his action on the contract; and second, that he could not sustain an action, without having first tendered a deed for execution; or at least having demanded it. On this point the court, after alluding to the English rule as laid down in Sugden, both the old rule and the modern one, said, that to put the vendor in default, and to entitle the vendee to recover back the purchase money, which he had paid in advance, he must tender the residue, and demand a conveyance. In such a case, when a part of the purchase money was due and tendered, a reasonable time should be allowed to the vendor to prepare the conveyance. It was admitted that the purchaser might prepare the conveyance himself, and tender it for execution at the time he made the payment or tender, but he was not bound to do so.

The case of *Hackett v. Huson*, (3 *Wend.* 249,) was covenant by the vendee against the vendor, on a covenant of the latter to deliver to the former by a certain day a good and sufficient warranty deed, &c. The case is imperfectly made as reported, but the supreme court assumed that the circuit judge had decided that when the vendee brings covenant on such an instrument, he must prepare and tender a deed for the vendor to execute. This they admitted was the English rule, but was not adopted in this state. They said that if the deed tendered by the vendor was objectionable in point of form, the vendee should have prepared one that did conform to the agreement, and present it for execution; and if the vendor refused he would then be in default.

In *Hudson v. Jewett*, (20 *John.* 24,) the action was to recover back part of the purchase money, on the ground that the contract was rescinded. The court held that to enable the purchaser to maintain the action, he must show that he has tendered the residue of the purchase money and demanded a deed. The chief justice said he would not decide that the purchaser must prepare the deed,

as is required in England, it not being necessary so to decide in that case. In that case the vendor had prepared and tendered the deed, which the vendee refused to accept.

The rule in Massachusetts and in Maine is the same as that in this state. In some of the states the modern English practice prevails. (*See note to Perk. ed. 1 Sugd. 310.*)

The rule in this state may be summed up as follows:

1. It is competent for the parties to stipulate in the preliminary contract of sale by whom and at whose expense the conveyance shall be prepared.

2. If no such special agreement be made, then it is the duty of the vendor to prepare the title deeds, at his own expense, and cause the requisite searches to be made for incumbrances.

3. The purchaser, to put the vendor in default, must demand the conveyance and wait a reasonable time for its preparation; or he may himself prepare the requisite deed and present it to the vendor for execution. In this latter case, the vendor should have a reasonable time to examine the deed before he is required to execute it. If the purchaser thus voluntarily prepares the deed himself, to which he is entitled, it must be at his own expense.

APPENDIX OF FORMS.

ACKNOWLEDGMENTS, PROOFS, ETC.

No. 1.

CERTIFICATE OF ACKNOWLEDGMENT BY A PARTY KNOWN TO THE OFFICER.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices of the supreme court, [or county judge of the county of, counsellor, &c., or one of the justices of the peace of the said county,] personally appeared A. B., whom I know to be the person described in the within deed, and acknowledged that he executed the same.†

[Signature of the officer.]

No. 2.

THE LIKE, WITH NOTICE OF ERASURES, ETC.

At the † add: I have examined the said deed, and find no material alterations or erasures, except that in the fifth line from the top, the name of *James Jackson* was written on an erasure, and between the 10th and 11th line, the words "*acres of land*," were interlined. If the alterations and erasures are noticed by the subscribing witness before his attestation, as they should be, the officer who takes the acknowledgment, need not refer to them.

NOTE. The acknowledgment need not be in the precise words of the act, but it is desirable to conform to it. (*Jackson v. Gumaer*, 2 Cowen, 552. *Duvall v. Covenhooven*, 4 Wend. 561.)

No. 3.

CERTIFICATE OF ACKNOWLEDGMENT, WHEN THE IDENTITY IS PROVED BY A WITNESS.

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices, &c., [as in No. 1,] personally appeared A. B., purporting to be the grantor in the within deed mentioned, and at the same time C. D., who is personally known to me, who being by me

duly sworn, testified that he is acquainted with the said A. B., and knows him to be the person described in, and who executed the said deed, which is to me satisfactory evidence of the identity of the said A. B., and thereupon the said A. B. acknowledged that he executed the said deed.

[Signature of officer.]

(1 R. S. 758, § 9. *Dibble v. Rogers*, 13 Wend. 536, 541.)

No. 4.

CERTIFICATE OF PROOF OF A DEED BY THE SUBSCRIBING WITNESS, WHEN THE OFFICER KNOWS THE SUBSCRIBING WITNESS.

(1 R. S. 758, § 12. *Dibble v. Rogers*, 13 Wend. 541. *Norman v. Wells*, 17 id. 136.)

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices, &c., [as in No. 1,] personally appeared E. F. † with whom I am personally acquainted, who being by me duly sworn, testified that his place of residence is in in said county, that he was present and saw the said A. B. execute the within deed, that he knew him the said A. B. to be the person described in the said deed, and who executed the same, and that he the said E. F. thereupon then and there subscribed his name thereto as a witness to the execution thereof.

[Signature of officer.]

No. 5.

THE LIKE, WHEN THE SUBSCRIBING WITNESS IS NOT KNOWN TO THE OFFICER, BUT HIS IDENTITY IS PROVED BY A THIRD PERSON.

The like, as in the last, to the †, and then proceed as follows:

Who purports to be the subscribing witness to the within deed, [or one of the &c.,] and at the same time C. D., who is personally known to me, who being by me duly sworn, said that he is acquainted with the said E. F., and knows him to be the person who is the subscribing witness to the said deed, which is to me satisfactory evidence of his identity; and thereupon the said E. F., being first duly sworn by me, testified that his place of residence is in, in said county, that he was present and saw the said A. B. execute the within deed, that he knew him, the said A. B., to be the person described in the said deed, and who executed the same, and that he the said E. F. thereupon then and there subscribed his name thereto as a witness to the execution thereof.

[Signature, &c.]

NOTE. If the instrument proved or acknowledged be a "mortgage," "assignment," "bond," &c., describe it according to the fact.

No. 6.

CERTIFICATE OF ACKNOWLEDGMENT BY HUSBAND AND WIFE, WHEN BOTH ARE KNOWN TO THE OFFICER.

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices of the supreme court, [or

county judge &c. as in No. 1,] personally appeared A. B., and C. his wife, whom I know to be the persons described in and who executed the within deed, and acknowledged that they severally executed the same; and the said C. on a private examination apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

[Signature, &c.]

(1 R. S. 758, § 10. *Gillett v. Stanley*, 1 Hill, 121.)

No. 7.

**THE LIKE, WHEN NEITHER HUSBAND OR WIFE IS KNOWN TO THE OFFICER,
AND THEIR IDENTITY IS PROVED BY A WITNESS.**

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices &c., [as in No. 1,] personally appeared A. B. and C. his wife, purporting to be the grantors named in the within deed, and also E. F. to me well known; and the said E. F. being by me duly sworn, testified that he is acquainted with A. B. and C. his wife, and knows them to be the persons described in and who executed the within deed, which is to me satisfactory evidence of the identity of the said A. B. and C. his wife. And thereupon the said A. B. acknowledged that he executed the said deed; and the said C. on a private examination apart from her said husband, acknowledged that she executed the same freely, without any fear or compulsion of her said husband.

[Signature, &c.]

(1 R. S. 758, § 9. *Dibble v. Rogers*, 13 Wend. 536, 541.)

No. 8.

**THE LIKE, WHEN THE HUSBAND IS KNOWN, AND THE IDENTITY OF THE
WIFE PROVEN TO THE OFFICER.**

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared A. B., and C. his wife, the said A. B. being known to me to be the person described in and who executed the within deed; and the said C. being proved by the oath of E. F. to be the wife of A. B. and the person described in and who executed the within deed, which is to me satisfactory evidence of her identity; whereupon the said A. B. and C. his wife, severally acknowledged that they executed the same. And the said C., on a private examination apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

[Signature, &c.]

(1 R. S. 758, § 10. *Dibble v. Rogers*, 13 Wend. 541.)

The officer need not certify that he knew the witness who identified the subscribing witness.

(*Jackson v. Harrow*, 11 John. 434. *Same v. Vickory*, 1 Wend. 406.)

No. 9.

**CERTIFICATE OF ACKNOWLEDGMENT BY TWO HUSBANDS AND THEIR WIVES,
KNOWN TO THE OFFICER.**

State of New York, County, ss: On this day of 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared A. B., and C. his wife, and E. F., and G. his wife, all of whom are known to me to be the persons described in and who executed the within deed, and severally acknowledged that they executed the same. And the said C. and G. severally, each for herself, on a private examination apart from her husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

[Signature, &c.]

No. 10.

CERTIFICATE OF ACKNOWLEDGMENT BY WIFE ALONE.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared C. B., wife of A. B., whom I know to be the person described in and who executed the within deed, and acknowledged, on a private examination apart from her husband, that she executed the same freely, without any fear or compulsion of her said husband.

[Signature, &c.]

No. 11.

CERTIFICATE OF ACKNOWLEDGMENT BY AN ATTORNEY IN FACT.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared A. B. whom I know to be the person described in and who executed the within deed, and acknowledged that he executed the same as the act and deed of C. D. therein described, by virtue of a power of attorney duly executed by the said C. D., bearing date the day of, 1860, recorded in the clerk's office of the county of, in Book M. of Powers of Attorney, page 68, on the day of, 1860.

[Signature, &c.]

No. 12.

CERTIFICATE OF ACKNOWLEDGMENT BY AN EXECUTOR, OR TRUSTEE.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared A. B. whom I know to be the person described in the within deed, as executor of the last will and testament of C. D., late of, deceased, and acknowledged that he executed the same as such executor.

[Signature, &c.]

No. 13.

CERTIFICATE OF ACKNOWLEDGMENT BY A SHERIFF.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared † A. B. Esquire, sheriff of the county of Saratoga, [or late sheriff,] whom I know to be the person described in and who executed the within deed, and acknowledged that he executed the same.

[Signature, &c.]

No. 14.

THE LIKE, WHEN EXECUTED BY UNDER SHERIFF, OR DEPUTY SHERIFF.

[A deputy sheriff may execute a deed in the name of the sheriff. *Jackson v. Bush*, 10 John. 223. *Same v. Davis*, 18 id. 7.]

Same as No. 13 to †, and then as follows: C. D. Esq., whom I know to be the person described in and who executed the within deed, as the general deputy of A. B. Esq., sheriff of said county, and acknowledged that he executed the said deed in the name of the said sheriff, by virtue of his authority as such general deputy as aforesaid.

[Signature, &c.]

No. 15.

CERTIFICATE OF THE ACKNOWLEDGMENT OF A DEED EXECUTED DURING INFANCY, BY WAY OF CONFIRMATION.

State of New York, County, ss: On this day of, 1860, before me the undersigned, one of the justices, &c., [as in No. 1,] personally appeared A. B. whom I know to be the person described in and who executed the within deed, and thereupon acknowledged that the same was formerly executed by him when he was an infant under the age of twenty-one years; that he has since arrived at full age, and is desirous of confirming his former execution thereof; and that he now acknowledges that he executed the same as and for his act and deed.

[Signature, &c.]

The deed of an infant is voidable only, except when it delegates a naked authority, when it is void. (*Bool v. Mix*, 17 Wend. 119. *Gillett v. Stanley*, 1 Hill, 121.)

No. 16.

CERTIFICATE OF PROOF OF DEED EXECUTED BY A MONEIED CORPORATION.

State of New York, County, ss: On this day of September, 1860, before me the undersigned, one of the justices, &c., [as in No. 1,] personally appeared S. F. whom I know to be the person described in and who executed the within deed, as president of the Bank of Saratoga Springs, who being by me duly sworn, testified that he resides in the village of Saratoga Springs, in the said county; that he is the president of the Bank of Saratoga Springs; that he knows the corporate seal of the said bank; that the seal affixed to the within deed is such cor-

porate seal; that it was so affixed by order of the board of directors of the said bank, and that he signed his name as such president to the said deed by the like order.

[Signature, &c.]

(*Leavitt v. The Steam Sawmill Association*, 6 Paige, 57, 59, 60. *Johnson v. Bush*, 3 Barb. Ch. 207.)

If the deed be executed by the cashier, secretary, or any other officer or person, the certificate will be modified accordingly.

No. 17.

THE LIKE BY A RELIGIOUS CORPORATION.

State of New York, *County*, ss: On this day of, 1860, before me the undersigned, one of the justices, [as in No. 1,] personally appeared A. B. to me well known, who being by me duly sworn, said that he resides in the town of Saratoga Springs, in said county, and is the clerk of the corporation of The Trustees of the Presbyterian Congregation of said town; that the seal affixed to the within deed is the corporate seal of the said corporation; and that it was so affixed by order of the said corporation; and that he the said A. B. subscribed his name thereto by the like order of the said corporation.

[Signature, &c.]

AGREEMENTS.

No. 18.

CONTRACT TO CONVEY PROPERTY.

Articles of agreement, made and entered into the day of, one thousand eight hundred and sixty-....., between, of the first part, and, of the second part, witnesseth, as follows:

The said party of the first part hereby agrees to sell unto the said party of the second part, all that certain piece or parcel of land, situate and being in the town of and county of, and bounded as follows: [here describe the premises intended to be sold.] for the sum of to be paid by the said party of the second part, in manner and at the times hereinafter mentioned and covenanted, on the part of the said party of the second part. And the said party of the first part further agrees, that on the day of on receiving from the said party of the second part the sum of the said party of the first part shall and will, at at own proper cost and expense, execute and deliver to the said party of the second part, or to assigns, a proper deed of conveyance, duly acknowledged, for the conveying and assuring to them the fee simple of the said premises, free from all incumbrances, which deed of conveyance shall contain a general warranty, and the usual full covenants.

And the said party of the second part hereby agrees to purchase of the said party of the first part, the premises above mentioned, at and for the price and sum above

mentioned, and to pay to the said party of the first part the purchase money therefor, in manner and at the times following, to wit:

And it is further agreed by and between the parties to these presents, that the said party of the first part shall have and retain the possession of said premises, and be entitled to the rents and profits thereof, until the day of, when full possession of the same shall be delivered to the said party of the second part by the said party of the first part. And it is understood and agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

And it is further hereby agreed, that in case the said party of the first part shall fail or refuse to execute and deliver a proper deed of conveyance in manner and at the time and place above specified for that purpose, provided the party of the second part shall be ready to fulfill and perform the covenants then to be fulfilled on part: or in case the said party of the second part shall fail or refuse to pay the said sum of at that time and place as above agreed upon, provided the party of the first part shall be ready to deliver such deed of conveyance, as aforesaid; then the party so failing shall and will pay to the other party, or assigns, the sum of dollars, which sum is hereby declared, fixed and agreed upon, as the liquidated amount of damages to be paid by the party so failing as aforesaid, for non-performance.

In witness whereof the parties to these presents have hereto set their hands and seals, the day and year first above written.

Sealed and delivered
in presence of

No. 19.

For a brief form of an agreement for the sale of a building, see *McWhorter v. McMahan*, 10 Paige, 386, and the remarks of the chancellor on it. Also see *Townsend v. Hubbard*, 4 Hill, 351, and the chancellor's criticism thereon.

No. 20.

ARTICLES OF AGREEMENT FOR THE PURCHASE OF A FREEHOLD ESTATE, WITH DIVERS COVENANTS BETWEEN THE PARTIES.

Articles of agreement made, concluded and agreed upon this day of, 1860, between John Doe, of the town of Saratoga Springs, in the county of Saratoga, of the first part, and Richard Roe, of the same place, of the second part, in manner following, to wit: [*]

First. The said party of the first part, for and in consideration of the sum of money to be therefor paid by the said party of the second part, and of the covenants and agreements hereinafter mentioned and contained on the part of the said party of the second part, doth for himself and his heirs covenant and agree to, and with the said party of the second part, his heirs and assigns, that the said party of the first part shall and will, at his own proper costs and charges, [or at the proper costs and charges of the said party of the second part, his heirs or assigns,] on or before the day of, next ensuing the date hereof, by a good and sufficient grant or conveyance in the law, as the said party of the second part, his heirs and assigns, or his or their counsel learned in the law shall reasonably de-

wise, advise or require, well and sufficiently grant, bargain and sell unto the said party of the second part, his heirs and assigns, forever, all that certain piece or parcel of land &c., [here describe the premises fully and accurately,] situate in the town of, in the county of, and state of New York, and all the estate, right, title, property, claim and demand of the said party of the first part, of, in and to the same, and every part thereof; and which said deed is to contain proper and apt covenants that the said party of the first part is, at the time of such conveyance, seised of the same premises, and every part thereof, of an indefeasible estate of inheritance therein; that he has good right and lawful authority to grant, bargain and sell the same; that the same and every part thereof are free from all and all manner of incumbrances; that the said party of the second part shall quietly enjoy the same and every part thereof, free and clear of all incumbrances of every name or nature; and that the said party of the first part will forever warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, [or it may say, and which said deed is to contain the usual covenants of warranty and against incumbrances—or the usual full covenants.]

Secondly. In consideration whereof the said party of the second part, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns,† that he, the said party of the second part, shall and will well and truly pay or cause to be paid to the said party of the first part, his heirs, executors, administrators or assigns, the just and full sum of dollars, at the time of executing the said conveyance, which said sum is agreed to be in full for the purchase of the said premises.

If it be agreed that instead of a cash payment, the purchaser is to give a mortgage on the premises, for the whole, or some part of the purchase money, proceed from † as follows :

That he, the said party of the second part, will pay dollars, part of the said purchase money, and will execute his bond and mortgage on the said premises to the said party of the second part, his executors, administrators and assigns, for the sum of, being the balance of the said purchase money, payable in manner following, to wit: one hundred dollars on the day of next, [set out the different payments with interest according to the agreement.]

If the vendor is to continue in the possession of the premises until the completion of the purchase, a covenant like this should be inserted :

And the said party of the first part doth covenant to and with the said party of the second part, his heirs, executors, administrators and assigns, that in the meantime he, the said party of the first part, will not cut down any timber or trees, or commit any waste or spoil whatsoever upon the said premises, or any part thereof, nor will he grant any lease of the said premises, or any part thereof, without the privity or consent of the said party of the second part, or his heirs or assigns.

If the parties agree to divide the expenses incident to the conveyance and the security of the purchase money, a clause like the following may be inserted :

And it is hereby mutually agreed by and between the said parties to these presents, that the expense of examining the title and preparing and recording the con-

veyance on the part of the party of the first part shall be borne by him, and the expense of preparing the securities for the payment of the purchase money and of the recording of the same, shall be borne by the said party of the second part, his executors, administrators or assigns.

If it be intended to provide against the destruction of the said premises by fire, between the acceptance of the title under the executory contract of sale and the delivery of the deed of said premises, a clause to this effect should be inserted:

And it is stipulated and agreed, that until the delivery of the deed of the said premises by the said party of the first part to the said party of the second part, the said premises shall be at the risk of the said party of the first part, his heirs or assigns; and in case the buildings thereon shall be burned by fire, or destroyed by lightning, between the day when the said title is accepted by the said party of the second part, and the day appointed for the delivery of the deed thereof, and the actual delivery of the said deed, then and in that case the said party of the second part, his heirs and assigns, shall be at liberty, at his option, to abandon the said purchase, or to complete the same; and if he elects to complete the said purchase, no deduction shall be made in the consideration money on account of such damage by fire or by lightning; but the insurance money, if the same premises be insured, shall belong to the said party of the second part, his heirs or assigns.

(See *Paine v. Meller*, 6 Ves. 350. 1 Sugd. on Vend. and Purchasers, 191. *Kidd v. Dennison*, 6 Barb. 9, 17. *Swartout v. Burr*, 1 id. 499. 2 Story's Eq. Jur. § 1212. *Champion v. Brown*, 6 John. Ch. 402. *Livingston v. Newkirk*, 3 id. 317. *Van Wyck v. Alliger*, 6 Barb. 511.)

If it be intended that the purchaser shall enter before the deed be given, but that he shall forfeit all previous payments, and deliver up the possession if he fails to make the subsequent payments as they fall due, this clause should be added:

And it is hereby further covenanted and agreed by and between the said parties, that the said party of the second part shall be permitted to enter into the immediate possession of the said premises, after the execution of this agreement; and in case he shall make default in either of the payments above mentioned in this contract, then the said party of the first part is to be discharged from this agreement to sell and convey the said premises, and the same shall become void and of none effect; and the said party of the second part is to forfeit to the said party of the first part all the previous payments, and give peaceable possession of the said premises to the said party of the first part.

(See *Edgerton v. Peckham*, 11 Paige, 352, as to the effect of such agreement in equity. *Wells v. Smith*, 7 id. 22.)

No. 21.

AGREEMENT FOR THE SALE OF A CITY LOT, THE DEED TO BE GIVEN AT A FUTURE DAY, THE PURCHASER TO ENTER IMMEDIATELY, TO PAY RENT AND TAXES, AND TO ERECT BUILDINGS ON THE LOT, AS PART PAYMENT OF THE CONSIDERATION, AND FORFEITURE ON NON-FULFILLMENT.

Commencement as in No. 20, to the *.

The said party of the first part, in consideration of the premises hereinafter mentioned, and upon the performance by the said party of the second part of the cov-

enants on his part to be kept and performed, doth covenant and agree to convey to the said party of the second part, his heirs and assigns, by a good and sufficient deed in the law, free from all incumbrances, except such taxes and assessments as may hereafter become due thereon, that certain lot of land situate and being in Broadway, in the ward of the city of New York, and known as lot No., bounded as follows: [set out the same.]

And the said party of the second part doth, for himself, his heirs, executors, administrators and assigns, covenant and agree to and with the said party of the first part, his heirs and assigns, that he, the said party of the first part, will (1.) Enter immediately into the possession of the said premises, and on or before the first day of March, 1861, build a carpenter's shop on the rear part of said lot, and not remove the same therefrom until this agreement is carried into full and complete effect. (2.) He agrees to build and enclose upon the front of the lot a substantial brick house, of three stories in height, on or before the first day of August, 1861, or in lieu thereof, and on the same day, to pay to the said party of the first part, or his legal representatives, the sum of one thousand dollars on account of the consideration money. (3.) To execute and deliver to the said party of the first part, on the same day, a bond and mortgage of the same house and lot for two thousand seven hundred dollars, payable with interest. And if the said party of the second part fails to pay the said one thousand dollars on the said first day of August, 1861, then the said bond and mortgage are to be made out for three thousand seven hundred dollars with interest; this being the full amount of consideration money for the purchase. (4.) The said party of the second part is to pay interest at the rate of per cent per annum, upon the sum of \$3700, to the said party of the first part, from the date of this agreement to the first day of August, 1861, the first half year's interest in advance, and all taxes and assessments on the same premises.

And the said party of the first part doth, on his part, covenant, promise and agree to and with the said party of the second part, his heirs and assigns, to execute and deliver to the said party of the second part a good and sufficient deed for the said lot on the first day of August, 1861, free from all incumbrances, except taxes and assessments, which may become due after the making of this agreement.

[Here state what covenants are to be contained in the deed.]

But upon this express condition, and the agreement between the parties is such that if the said party of the second part fails or neglects to perform all or any one of the covenants hereinbefore contained on his part, at the time or times hereinbefore limited, then and in such case all and singular the covenants and agreements on the part of the said party of the first part, shall cease and be absolutely void; and all the right, title and interest of the said party of the second part, in law or equity, in the premises, shall also cease; and thereupon the said party of the first part, his heirs and assigns, may immediately enter upon the premises and have and hold the same, with the carpenter shop, free and discharged from any claims of the said party of the second part, his heirs or assigns.

Dated 1 May, 1860.

A. B. [L. s.]

Sealed and delivered the day and year
above written, in presence of

C. D. [L. s.]

(See *Wells v. Smith*, 2 Edw. Ch. R. 78; S. C. on appeal, 11 Paige, 22.)

No. 22.

ANOTHER FORM OF AGREEMENT FOR THE SALE OF A FARM, OR A CITY LOT, THE AGREEMENT TO BE VOID, IF THE PURCHASER FAILS TO MAKE PAYMENTS PROMPTLY, AND THE VENDOR AT LIBERTY TO SELL TO OTHER PARTIES.

Articles of agreement, made the day of, one thousand eight hundred and, between of the first part and of the second part, witnesseth, that the said part.. of the first part, for and in consideration of the sum of dollars, to in hand paid, ha.. contracted and agreed to sell to the said part.. of the second part, all that certain piece or parcel of land, situate in the town of, in, county and state of known and distinguished on a map made by as lot No. And on the payment by the said party of the second part, to the said party of the first part, of the several sums of money hereinafter mentioned, the said part.. of the first part, agree to execute and deliver to the said part.. of the second part, a warranty deed, for the said land: provided, and upon condition nevertheless, that the said part.. of the second part, heirs or assigns, pay to the said part.. of the first part, heirs or assigns, for the same land, the sum of, lawful money of the United States of America, payable as follows: the sum of, together with lawful interest on the same, from the date hereof; and the said part.. of the second part, for heirs, executors and administrators, do.. covenant and agree, to and with the said part.. of the first part, heirs and assigns, that the said part.. of the second part, will pay the said several sums as they severally become due, with the interest thereof, without deduction of any taxes or assessments whatever. And it is further agreed between the parties to these presents, that if default be made in fulfilling this agreement, or any part thereof, on the part of the said part.. of the second part, then, and in such case, the said part.. of the first part, heirs and assigns, shall be at liberty to consider this contract as forfeited and annulled, and to dispose of the said land to any other person, in the same manner as if this contract had never been made.

In witness whereof, have hereunto set hand.. and seal.. the day and year above written.

Sealed and delivered in
presence of

(See *Wells v. Smith*, 2 Edw. Ch. R. 78; S. C., 11 Paige, 22.)

No. 23.

AGREEMENT FOR THE SALE OF REAL ESTATE, EXECUTED ON THE PART OF THE VENDOR, BY ATTORNEY DULY AUTHORIZED.

Articles of agreement, made and concluded this day of, 1860, between James Jackson, of the town of, county of, and state of New York, by John Doe, his attorney duly authorized for this purpose, of the first part, and John Stiles, of the same place, of the second part, as follows, to wit:

The said party of the first part, for and in consideration of the sum of, and of the covenants and agreement, on the part of the said party of the second part, hereinafter contained, on his part to be kept and performed, doth covenant

and agree to and with the said party of the second part, his heirs and assigns, to grant, bargain and sell unto the said party of the second part, his heirs and assigns, by a good and sufficient deed, with covenants of title and against incumbrances, the following described piece or parcel of land, to wit, [here describe it,] the said deed to be prepared at the expense of the said first party, and ready to be delivered to the party of the second part, on or before the day of next.

And the said party of the second part, for himself, his heirs and assigns, doth covenant and agree to and with the said party of the first part, and his legal representatives, to pay to him the sum of on the delivery of the said deed, and to execute and deliver, at his own expense, a bond and mortgage of the same premises, for the sum of, being the residue of the consideration money for said purchase, payable in two years from the said day of the delivery thereof, with lawful interest till paid, to the said party of the first part, his executors and administrators.

And it is further covenanted and agreed by and between the said parties, that the said party of the second part shall be at liberty to enter immediately into the possession of the said premises, and cultivate and improve the same in a good husbandlike manner, and commit no waste or other destruction thereon, and that from the time of such entry, the said party of the second part shall pay unto the said party of the first part the sum of annually, being the interest of the purchase money for the said premises, and also pay all taxes and assessments thereon; and in default of payment of principal or interest that shall become due before the delivery of the said deed, or which shall be due at that time, the said party of the first part shall be at liberty to avoid this contract, and re-enter upon the said premises, without notice to quit; and in such case the said party of the second part shall immediately give up possession of said premises.

In witness whereof, the said party of the first part, by his said attorney, and the said party of the second part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in
presence of

JAMES JACKSON, [L. s.]
by John Doe, his Att'y.
JOHN STILES. [L. s.]

NOTE.—An agreement entered into under seal, by one as attorney for another, must be executed by the attorney in the name of his principal, and must purport to be sealed with the seal of the principal, and not with that of the attorney.

(Townsend v. Hubbard, 4 Hill, 351. Wilks v. Back, 2 East, 142. Berkley v. Hardy, 5 Barn. & Cres. 355.)

No. 24.

AGREEMENT TO BE INSERTED IN AN EXECUTORY CONTRACT OF A VACANT LOT, OR OTHER PREMISES, NOT TO ERECT OR SUFFER NUISANCES TO BE ERECTED THEREON.

And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said party of the first part, his heirs, executors and administrators, that neither the said party of the second part, nor his heirs or assigns, shall or will at any time hereafter erect any building within forty feet of

the front of said lot, except of brick or stone, with roofs of slate or metal; and will not erect or permit upon any part of said lot any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory, or any manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine; or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery, or any other noxious or dangerous trade or business.

No. 25.

AGREEMENT BY A TRUSTEE TO CONVEY LANDS HELD IN TRUST, IN A CASE WHERE THE TRUSTEE WAS AUTHORIZED TO SELL LAND, AND REINVEST THE PROCEEDS.

Articles of agreement, made, concluded and agreed upon this day of, 1860, between John Doe, named as trustee in certain articles of marriage settlement hereafter mentioned, of the first part, and Richard Roe, of, &c., of the second part, as follows:

Whereas, James Jackson, of, did by an instrument in writing under his hand and seal, bearing date the day of, 1860, in contemplation of the marriage of his daughter A. B. to one C. D., then about to be solemnized, and in consideration thereof, and as a settlement upon his said daughter of the lands therein described, did grant, bargain and sell unto the said John Doe the following described piece or parcel of land, situate and being (&c.,) in trust, to receive the rents and profits of the said land, and apply them to the separate use of the said A. B. during her coverture with her intended husband, free from the control of her said husband, the same as if she were a *feme sole*, her receipt therefor to be a sufficient voucher. And it was thereby, in and by the said marriage articles, further agreed, that the said party of the first part should be authorized and empowered, during the continuance of the said trust, to lease and demise the granted premises for such lawful term or terms, and at such rents and upon such covenants as to renewals as to them should seem proper; and that he should be, and was thereby, authorized and empowered to grant, bargain, sell and convey in fee simple absolute, at public or private sale, for cash or upon credit, or partly for cash and partly upon credit, all or any part or parcel of the said trust premises, or of any other premises in which the proceeds thereof might be reinvested, and to invest the proceeds of such sale or sales in other real estate or upon bonds and mortgages within the state of New York, or in the public stocks of the United States, or of the city of New York, or in improving other parts of the said real estate, and to alter and change such investments from time to time as he may think proper, as by the in part recited agreement more fully and at large appears. And whereas, the said party of the first part, as such trustee, and in pursuance of the power therein vested in him, hath agreed to grant, bargain and sell to the said party of the second part the premises above described for the sum of 1000 dollars, with a view to reinvest the proceeds thereof in the public stocks of the United States for the purposes of the said trust.

Now, therefore, it is agreed by the said parties to these presents, that on or before the day of next, the said party of the first part will, by a good and sufficient deed in the law, grant, bargain and sell unto the said party of the second part, his heirs and assigns, the above described premises, on the pay-

ment by him of the said sum of one thousand dollars, and which said deed shall contain a covenant that the said party of the first part, as such trustee, has good right and lawful authority to convey the said premises in manner aforesaid, and that he has neither done or suffered any act whereby his right to convey the said premises can be impaired. And the said party of the second part covenants and agrees to accept such deed, and on the delivery thereof to pay to the said first party the said sum of one thousand dollars.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

JOHN DOE. [L. S.]
RICHARD ROE. [L. S.]

NOTE. See *Belmont v. O'Brien*, 2 Kern. 394. *Noyes v. Blakeman*, 2 Seld. 567. If the trustee be an executor, and his authority derived from the will of the testator, recite enough of it to confer the authority.

ANNUITIES.

For the form of an annuity under the English laws, see 1 Newnam's Conveyancer, 146 et seq. An annuity charged upon land, is a rent charge, and the form will be given under the head of Rent, post.

ASSIGNMENTS.

No. 26.

ASSIGNMENT OF MORTGAGE.

Know all men by these presents, that of the first part, for and in consideration of the sum of lawful money of the United States of America, to in hand paid by of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said part.. of the second part, a certain indenture of mortgage bearing date the day of, one thousand eight hundred and made by and recorded in the office of the clerk of the county of in book No. of mortgages, page, on the day of, in the year of our Lord one thousand eight hundred and, together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To have and to hold the same unto the said part... of the second part, and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned. And do hereby authorize and appoint the said part.. of the second part true and lawful attorney, irrevocable, in name or otherwise, but at proper costs and charges, to have, use, and take all lawful ways and means, for the recovery of

the said sum of money, and interest secured to be paid in and by the said bond and mortgage; and in case of payment, to discharge and satisfy the same as fully as might or could do if these presents were not made. And do hereby covenant, promise and agree, to and with the said part.. of the second part, that there is now secured to be paid by the said bond and mortgage the sum of.....

In witness whereof, have hereunto set hand.. and seal.., the day of one thousand eight hundred and

Sealed and delivered in
presence of

No. 27.

A SHORTER FORM INDORSED ON THE MORTGAGE.

In consideration of to me in hand paid, by, of, I do hereby grant, bargain, sell, assign, transfer and set over to him, the within mortgage and the bond accompanying the same, for his use and benefit, together with all the remedies to enforce the collection of the same.

Witness my hand and seal this day of, 1860.

NOTE. Assignments of mortgages should be acknowledged or proved and recorded. 1 R. S. 762, § 38. 2 id. 134, § 6. The assignee cannot otherwise give the requisite discharge, on payment, so as to have the mortgage canceled of record. The recording of the assignment will not dispense with the necessity of proof of notice of such assignment to the mortgagor. (1 R. S. 763, § 41. *Vanderkempt v. Shelton*, 11 Paige, 37. *Trust Co. v. Smith*, 2 Barb. Ch. 84.) A bond and mortgage may be assigned by parol, so as to pass the title to the assignee. (*Runyan v. Mersereau*, 11 John. 534.) But a written assignment, under seal, duly proved or acknowledged, is recommended in all cases.

No. 28.

ASSIGNMENT OF A LEASE BY THE LESSOR TO A THIRD PERSON.

Know all men by these presents, that I, John Doe, of, for and in consideration of the sum of, to me in hand paid by Richard Roe, of, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over to the said Richard Roe, his executors, administrators and assigns, a certain indenture of lease, bearing date the day of, made by me, the said John Doe, to James Jackson, his executors, administrators and assigns, for the term of years from the date thereof, at the annual rent of, payable, and which said lease granted and demised certain premises therein described; to have and to hold the said lease and the rents thereby secured to the said Richard Roe, his executors, administrators and assigns; and I do covenant and agree to and with the said Richard Roe, that I have good right and lawful authority to assign the said lease, and the rents to become due thereon, and that the rent from the day of, 1860, is unpaid, and is payable as the same becomes due, according to the terms of the said lease.

In witness whereof I have hereto set my hand and seal this day of, 1860.

Sealed and delivered in
presence of

JOHN DOE. [L. S.]

NOTE. The above assignment only transfers the rent, but not the reversion. The rent may be severed from the reversion. (*Demarest v. Willard*, 8 Cowen, 206.) A grant of the reversion by the lessor, to a third person, would pass not only the reversion, but the rent also, as an incident to the reversion. A common bargain and sale, or a grant under the statute, is sufficient for this purpose. See post.

For a shorter form of an assignment of the rent, see *Demarest v. Willard*, *supra*.

No. 29.

ASSIGNMENT OF A LEASE BY THE LESSEE TO A THIRD PERSON, AND THE COVENANT OF THE LATTER TO SAVE THE FORMER HARMLESS FROM THE RENT, ETC.

It is agreed between A. B., of, lessee named in the lease hereinafter named, and C. D., of, as follows:

The said A. B., for and in consideration of the sum of, to him in hand paid by the said C. D., and of the covenants and agreements of the said C. D. hereinafter contained, hereby grants, bargains, assigns, transfers and sets over to the said C. D., his executors, administrators and assigns, a certain indenture of lease, bearing date the day of, made by James Jackson to the said A. B., his executors, administrators and assigns, for the term of years from the date thereof, for a certain house and lot therein described, at the rent of, payable, subject, nevertheless, to the payment by the said C. D., his executors, administrators and assigns, of the rent therein mentioned, and the performance of the covenants therein contained.

And the said C. D., on his part, doth covenant and agree to and with the said A. B., that he, the said C. D., will well and truly pay the said rent to the party entitled thereto, and perform the several covenants on the part of the lessee of the said premises, to be performed and kept; and will indemnify and save harmless the said A. B., of and from all damages, costs and charges, which he may be subjected to by reason of any neglect or default of him, the said C. D., or his assigns, in the premises.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

A. B. [L. s.]
C. D. [L. s.]

No. 30.

A SHORT FORM OF ASSIGNMENT, BY LESSEE TO A THIRD PERSON, BY INDORSEMENT.

In consideration of to me in hand paid, I do hereby assign and transfer to C. D., his executors, administrators and assigns, the within lease and all my estate, right, title and interest in the same, and to the lands therein mentioned, subject to the rents and covenants therein contained. In witness whereof, &c.

Sealed and delivered in
presence of

No. 31.

ASSIGNMENT OF A CONTRACT FOR THE PURCHASE OF A FARM, BY THE PURCHASER TO A THIRD PERSON, AND THE AGREEMENT OF THE LATTER TO INDEMNIFY THE FORMER.

This agreement, made and concluded this day of, 1860, between A. B. of, of the first part, and C. D. of, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of, dollars, to him in hand paid by the said C. D., and of the covenants and agreements on the part of the said C. D., hereinafter mentioned, to be performed by him, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over to the said C. D., his heirs and assigns, a contract for the purchase of lot No., in the town of, described as follows:: which said contract was made and executed by James Jackson, of, to the said A. B., his heirs and assigns, and bears date the day of, 1860, and all the estate, right, title, property, claim and demand of, in and to the same, and the premises therein agreed to be sold by the said James Jackson to the said party of the first part; subject, nevertheless, to the covenants, conditions and payments therein mentioned.

And the said party of the second part, for himself, his heirs, executors and administrators, doth covenant and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he will perform the conditions and make the payments in the said contract required to be kept, performed and made, and indemnify and save harmless the said party of the first part of and from all and all manner of damages, costs and charges which may be occasioned by reason of the neglect or default of the said party of the second part, his heirs, executors or administrators, in the premises.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

Sealed and delivered
in presence of

A. B. [L. s.]
C. D. [L. s.]

No. 32.

ASSIGNMENT IN TRUST FOR THE BENEFIT OF CREDITORS.

This indenture made the day of, in the year of our Lord one thousand eight hundred and sixty-....., between A. B. of the town of in the county of, of the first part, and C. D. of the town of, in the county of, of the second part,

Whereas the said A. B. is justly indebted in divers sums of money to divers persons, and from various unfortunate circumstances has become unable to pay the same in full, and is desirous of making a fair and equitable distribution of all his property, real and personal, among his creditors: Now therefore, this indenture witnesseth, that the said party of the first part, in consideration of the premises, and of the sum of one dollar to him in hand paid by the said party of the second

part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, released, assigned, transferred and set over, and by these presents doth grant, bargain, sell, release, assign, transfer and set over unto the said party of the second part, and to his heirs and assigns forever, all and singular the lands, tenements and hereditaments of the said party of the first part, wheresoever the same may be situated, and which lands are intended to be correctly described in schedule (A.) hereto annexed, and to pass to the said assignee, under this assignment, whether correctly described or not; and also, all the goods, chattels, rights and credits, judgments, bonds, choses in action, evidences of debt, and property of every name and nature whatever of the said party of the first part, and the books, vouchers and securities relating to the same, and which are intended to be particularly described and enumerated in the schedule hereto annexed marked (B.) and to pass to the said assignee, whether correctly described or not, except such articles of property as are by law exempt from execution.

To have and to hold the same, and every part and parcel thereof, with the appurtenances, to the said party of the second part, his heirs, executors, administrators and assigns; IN TRUST, nevertheless, and to and for the following uses, intents and purposes, that is to say: the said party of the second part shall take possession of all and singular the lands, tenements and hereditaments, property and effects, hereby assigned, and sell and dispose of the same, and convert them into money; and also collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands and choses in action; and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purpose of passing the title thereof to the respective purchaser or purchasers; and by and with the proceeds of such sales and collections, the said party of the second part shall first pay and disburse all the just and reasonable expenses, costs, charges and commissions of executing and carrying into effect this assignment, and all rents, taxes and assessments due or to become due on the lands, tenements and hereditaments aforesaid, until the same shall be sold and disposed of; and by and with the residue or net proceeds and avails of such sales and collections, the said party of the second part shall—

First. Pay and discharge in full the several and respective debts, bonds, notes and sums of money due or to grow due from the said party of the first part, to the several persons designated in the schedule hereto annexed, marked schedule (C.,) together with all interest due or to grow due thereon; and if said net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and avails shall be distributed *pro rata*, share and share alike, among the said several persons named in said schedule (C.,) according to the amount of their respective claims: and

Secondly. By and with the residue and remainder of said net proceeds and avails, if any there shall be, the said party of the second part shall pay and discharge all the other individual debts, demands and liabilities whatsoever, now existing, whether due or hereafter to become due, except such individual liabilities of the said party of the first part as may have been incurred by him as surety or indorser or guarantor for others, provided such remainder shall be sufficient for that purpose; and if insufficient, then the same shall be applied *pro rata*, share and share

alike, to the payment of the said debts, demands and liabilities, according to their respective amounts, as in schedule (D.,) hereto annexed. And—

Thirdly. By and with the residue and remainder of the said net proceeds and avails, if any there shall be, the said party of the second part shall pay and discharge all the debts and liabilities of the said party of the first part, incurred by him as surety or indorser, or guarantor or bail, for any other person or persons, whether due or to grow due; and all such indebtedness as he may have incurred as a member of any copartnership, or as a joint debtor with any other person or persons; and if insufficient, then the same shall be applied *pro rata*, to the payment of the said debts and liabilities, share and share alike, according to their respective amounts, and which are mentioned in schedule (E.)

It is the intention of the said party of the first part to make, hereby, a full and unconditional surrender of his property to the payment of his debts and liabilities, except such articles of wearing apparel and personal property as are exempt by law from execution; and it is his design that all his debts and liabilities shall be paid in one or the other of the above classes, in the manner therein specified, to the extent of the property hereby assigned, whether such debts are therein mentioned or not.

In witness whereof, the said party of the first part has hereto set his hand and seal, the day and year first above written.

Sealed and delivered in
presence of

A. B. [L. s.]

SCHEDULE A—referred to in the foregoing assignment.

The following is a description of the real estate of the said A. B., intended to be assigned in trust for the benefit of creditors, and being all the real estate of which he is seised or possessed:

1. A house and lot situate, &c.; describe the different pieces of land, &c.

SCHEDULE B—referred to in the foregoing assignment.

A bond against John Doe, conditioned to pay \$1000, dated \$1000
A note against

[Set forth, as far as practicable, an inventory of the personal property intended to be assigned; and set forth the excepted articles by themselves.]

SCHEDULE C—referred to in the foregoing assignment.

The *first* class of debts:—

A promissory note, dated, payable to A. B. or order, now due, about \$500
[Set out all the preferred debts.]

SCHEDULE D—referred to in the foregoing assignment.

An account due to O. P. for wood purchased of him, \$100
[Set out the other debts.]

SCHEDULE E—referred to in the foregoing assignment.

[Here set out the debts for which the assignor is surety, &c. &c., if any.]

NOTES. 1. An assignment should not authorize the assignee to sell *on credit* (Barney v. Griffin, 2 Comst. 365. Nicholson v. Leavitt, 2 Seld. 510. Porter v. Clark, 5 How. Pr. Rep. 445. S. C., 5 Seld. 142. Willard's Eq. Jur. 246.)

2. Assignment may provide for the payment of the costs and commissions of the trustee. (Meacham v. Sternes, 9 Paige, 398. Barney v. Griffin, supra.)

3. An assignment may give preference amongst creditors. (Boardman v. Halliday, 10 Paige, 223. Griffin v. Barney, 2 Comst. 371.)

4. But an assignment cannot vest the assignee with power to give *future preferences*. (S. Cases.) They must be declared by the assignor at the time.

5. A clause requiring the assignee to return the surplus to the assignor, after paying debts and charges, is useless and unnecessary, though it would not probably invalidate the assignment. The law would return the surplus. (Bogert v. Haight, 9 Paige, 297, 303. Beck v. Burdett, 1 id. 305.)

6. It is probably unnecessary to have a schedule annexed to the assignment, giving a full description of the real estate of the assignor. The general description in the assignment is enough to pass the title. But it will be found convenient, where there are different pieces of land assigned, to have them specified, so that the purchaser from the assignee can more easily trace back his title.

7. A clause, excepting such articles as are exempt by law from execution, is valid, and does not tend to defraud the creditors. It takes nothing from them which the law has made applicable to debts. The exemption is a personal privilege, which the debtor may insist on or waive. (Mickles v. Tousely, 1 Cowen, 114. Earl v. Camp, 16 Wend. 571. 3 R. S. 450, 646, 647, 5th ed. Carpenter v. Herrington, 25 Wend. 370. Hall v. Penny, 11 id. 44.)

8. The assignor may empower the assignee to compromise such of the debts assigned as are doubtful, by receiving a part of the sum due, and discharging the residue. (Dow v. Platner, 16 N. Y. R. 562.) If this is intended, a clause to that effect should be added in the assignment.

9. By the act of April 13, 1860, (L. of 1860, p. 594,) the debtor is required to annex an inventory of his estate to the assignment, and within twenty days thereafter deliver it to the county judge of the county in which such debtor resides. (See the act for various other matters.)

CONVEYANCES BY DEED AND MORTGAGE.

No. 33.

BARGAIN AND SALE WITHOUT COVENANTS OF WARRANTY.

(1 R. S. 739, § 142.)

This indenture, made the day of, in the year one thousand eight hundred and between of the first part, and of the second part, witnesseth, that the said part.... of the first part, for and in consideration of the sum of lawful money of the United States of America, to in hand paid, by the said part.... of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, ha.... granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do.... grant, bargain, sell, alien, remise, release, convey and confirm unto the said part.... of the second part, and to and assigns forever, all Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and prof-

its thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part . . . of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said part . . . of the second part, and assigns forever.

In witness whereof, the said part . . . of the first part ha . . . hereunto set hand.. and seal.. the day and year first above written.

Sealed and delivered in
presence of

No. 34.

BARGAIN AND SALE, WITH THE COVENANT OF WARRANTY.

This is the common warranty deed used in this state. (1 R. S. 739, § 142.)

This indenture, made the day of, in the year one thousand eight hundred and, between, of the town of, in the county of, of the first part, and of the town of in the county of, of the second part, witnesseth, that the said part . . . of the first part, for and in consideration of the sum of lawful money of the United States of America, to in hand paid by the said part.. of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha . . granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do.. grant, bargain, sell, alien, remise, release, convey and confirm unto the said part.. of the second part, and to heirs and assigns forever, all Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part.. of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said part.. of the second part, heirs and assigns forever.

And the said heirs, the said premises, in the quiet and peaceable possession of the said part . . . of the second part, heirs and assigns, against the said part.. of the first part, heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said part . . of the first part, ha . . hereunto set hand.. and seal.., the day and year first above written.

Sealed and delivered in
presence of

No. 35.

QUIT-CLAIM DEED.

To all to whom these presents shall come, greeting: Know ye, that for and in consideration of the sum of dollars, lawful money of the United States of America, to in hand paid by, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and forever quit-claimed, and by these presents do remise, release and forever quit-claim unto, and to heirs and assigns forever, all To have and to hold the said released premises unto the said, heirs and assigns to own proper use and behoof forever.

* In testimony whereof, the said ha.... hereunto set hand.. and seal.. this day of, in the year of our Lord one thousand eight hundred and

Sealed and delivered in
presence of

No. 36.

QUIT-CLAIM DEED, WITH A COVENANT AGAINST THE ACTS OF THE GRANTOR.

The same as No. 35 to, and then proceed*—And the said doth covenant with the said, his heirs and assigns, that he hath not done or suffered any act or thing whereby the estate hereby released may be impeached, charged or incumbered, in any manner whatsoever.

No. 37.

A GRANT OF AN ESTATE IN FEE, UNDER THE STATUTE, WITHOUT COVENANTS OF TITLE.

(1 R. S. 738, § 137.)

This indenture, made the day of, in the year one thousand eight hundred and sixty-...., between A. B. of, of the first part, and C. D. of, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, and by these presents doth grant, unto the said party of the second part, and to his heirs and assigns forever—all that certain, &c., [here describe the premises,] together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, claim and demand whatsoever of him the said party of the first part, either in law or equity, of, in and to the same, and every part thereof. †

In witness whereof, &c. [as in No. 33.]

No. 38.

A GRANT UNDER THE STATUTE WITH COVENANTS OF WARRANTY.

The same as in No. 37 to †, and then add the covenants intended to be given, as in a full covenant deed, or such of them as are required.

NOTE. A statute grant may be drawn still shorter than the above; but most parties prefer the form of conveyances to which they have been accustomed.

No. 39.

FULL COVENANT DEED—A SHORT FORM.

This indenture, made the day of one thousand eight hundred and, between, of the first part, and, of the second part, witnesseth: That the said part.... of the first part, in consideration of dollars to duly paid, ha.... sold, and by these presents do.... grant and convey, to the said part.... of the second part, and to heirs and assigns, forever, all with the appurtenances, and all the estate, right, title and interest of the said part.... of the first part therein.* And the said..... do.... hereby covenant and agree to and with the said part.... of the second part, that at the time of making this conveyance the lawful owner.. of the premises above granted and seised of a good and indefeasible estate of inheritance therein, and that they are free and clear of inchoate dower rights, and of all incumbrances whatsoever,, and the above granted premises in the quiet and peaceable possession of the said part.... of the second part, heirs and assigns, against every person whomsoever, will warrant and forever defend.

In witness whereof, the said part.... of the first part, ha.... hereunto set hand.. and seal.. the day and year first above written.

Sealed and delivered in presence of

No. 40.

FULL COVENANT DEED—USUAL FORM.

*The same as in No. 39 to the *, and then as follows:* To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever. And the said party of the first part, for himself, his heirs, executors and administrators, doth covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents, is lawfully seised, in his own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular, the above granted and described premises, with the appurtenances, and hath good right, full power and lawful authority, to grant, bargain, sell and convey the same in manner aforesaid. And that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, hindrance,

Covenant of
seisin.

Covenant for
quiet enjoy-
ment.

molestation or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same and every part thereof are now free, clear and discharged of
Covenant against incumbrances. and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever.

And also, that the said party of the first part, and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the herein granted premises, by, from, under or in trust for him or them, shall and will at all time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make and execute, or cause to be made and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs and assigns, or his or their counsel, learned in the law, shall be reasonably advised, devised or required.

And the said party of the first part, for himself and his heirs, the above described
Covenant of warranty. and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness, &c. (as before in No. 39.)

Sealed and delivered in

presence of

Acknowledgment, or proof, &c.

As to the form of deeds and their effect, see 1 R. S. 738 et seq.

A conveyance is good to pass the title without any covenants. (*Nixon v. Hyserott*, 5 John. 58. *Jackson v. Fish*, 10 id. 456. *Beddoe v. Wadsworth*, 21 Wendell, 120.)

No. 41.

*If the deed be given, subject to the payment by the purchaser, of a mortgage or other incumbrance, insert a clause like the following, before the habendum clause at the * in No. 39, to wit:*

Subject, however, to the payment and performance by the party of the second part, his executors and assigns, of the conditions contained in a certain indenture of mortgage, executed by, on the day of, to, and recorded in the clerk's office, of the county of, in book of mortgages, pages, on the day of, at o'clock A. M., and which said mortgage was given to secure the payment of the sum of, at the time and in the manner therein mentioned, and upon which there is now due and payable, [or to become due and payable,] the sum of, with interest from the day of

And at the close of the several covenants respectively, add "except as against the incumbrance above mentioned."

(See post, under "Covenants.")

 No. 42.

DEED TO A CORPORATION.

This indenture, made the day of, 186..., between A. B., of the town of, in the county of, of the first part, and the Saratoga and Whitehall Rail Road Company, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of, to him in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and confirmed, and by these presents doth grant, bargain, sell, remise, release and confirm unto the said party of the second part, their successors and assigns forever, all that certain piece or parcel of land, [describe the same,] together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances unto the said party of the second part, and their successors and assigns forever. †

The covenants, &c., as in No. 39 or 40, according to the agreement.

 No. 43.

THE LIKE, UPON A CONDITION THAT THE COMPANY SHALL BUILD THEIR ROAD WITHIN A CERTAIN TIME.

Same as in No. 42 to the †, and then add: Provided always, and these presents are upon this express condition, that the said party of the second part shall construct their rail road and put it in operation within the time prescribed by the act incorporating the same, [or any other time to be agreed on by the parties.]

Then proceed as in the last precedent.

NOTE. This is a condition subsequent. The title vests in fee in the corporation, and is subject to be divested, on failure to perform the condition, on an entry by the grantor, or its equivalent. (*Nicoll v. The New York and Erie R. R. Co.*, 2 Kern. 121. S. C., 12 Barb. 460.)

 No. 44.

DEED BY A CORPORATION.

This indenture, made the day of, 186..., between the Saratoga and Whitehall Rail Road Company, [or The Bank of Saratoga Springs,] of the first part, and C. D., of, &c. &c., of the second part.

And then proceed as in the case of a deed by an individual, to the covenants, which will be in this form:

And the said party of the first part doth covenant, &c., or, as in the foregoing precedents.

In witness whereof, the said party of the first part hath hereunto caused their corporate seal to be affixed, and these presents to be subscribed by their president and secretary, [*or cashier, as the case may be,*] the day and year first above written.

Sealed and delivered in	Signed,, President.
presence of	, Secretary.
E. F.	Acknowledged as in No. 16.	

No. 45.

DEED BY HUSBAND AND WIFE, WITH A VIEW TO EXTINGUISH HER INCHOATE RIGHT OF DOWER.

The same as in other cases, except that the wife is made a grantor with her husband, and is therein so described—as “A. B. of, and C. his wife,” &c.

The acknowledgment, as in No. 6, or some of the other forms applicable to the case.

No. 46.

DEED BY THE WIFE ALONE, WHERE SHE HAS OMITTED TO JOIN WITH HER HUSBAND, THE OBJECT BEING MERELY TO RELEASE HER INCHOATE RIGHT OF DOWER.

This indenture, made the day of 186., between A. B., the wife of C. D., of, of, of the first part, and E. F., of of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of to her in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and confirmed, and by these presents doth grant, bargain, sell, remise, release and confirm unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, estate, claim and demand, both at law and in equity, as well present as in expectancy, and all claim of dower therein, of, in and to all that certain piece or parcel of land situate, [describe the premises.]

In witness whereof, &c.

Sealed and delivered in
presence of
E. F.

A. B. [L. S.]

Certificate of acknowledgment, as in No. 10.

NOTE. It is most usual for the wife to join with her husband in the deed; but if this has been omitted, she can execute a separate release of her dower, without her husband being joined with her. The *Albany Ins. Co. v. Bay*, 4 Comst. 9.

But she cannot bind herself by covenants, and they are not inserted in a deed when she executes it alone without her husband.

No. 47.

ANOTHER FORM OF A DEED WITH FULL COVENANTS, AND ALSO A COVENANT AGAINST THE ERECTION OF NUISANCES ON THE SAID PREMISES.

This indenture, made the day of, in the year one thousand eight hundred and .., between, of the first part, and, of the second part,

witnesseth: That the said part.. of the first part, for and in consideration of the sum of, lawful money of the United States, to in hand paid, by the said part.. of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said part.. of the second part, heirs, executors and administrators, forever released and discharged from the same, by these presents, ha.. granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do.. grant, bargain, sell, alien, remise, release, convey and confirm unto the said part.. of the second part, and to heirs and assigns forever, all, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part.. of the first part, of, in and to the same, and every part and parcel thereof with the appurtenances: To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said part.. of the second part, heirs and assigns, to their own proper use, benefit and behoof, forever.

And the said, for heirs, executors and administrators, do.. hereby covenant, grant and agree to and with the said part.. of the second part, heirs and assigns, that the said, at the time of the sealing and delivery of these presents, lawfully seised in of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances, and ha.. good right, full power and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid; and that the said part.. of the second part, heirs and assigns, shall and may, at all times hereafter, peacefully and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said part.. of the first part, heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever.

And also, that the said part.. of the first part and heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said part.. of the second part, heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said part.. of the second part, heirs and assigns forever, as by the said part.. of the second part, heirs or assigns, or their counsel learned in the law, shall be reasonably advised or required: and the said heirs, the above described and hereby granted and released premises,

and every part and parcel thereof, with the appurtenances, unto the said part.. of the second part, heirs and assigns, against the said part.. of the first part, and heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

And the said part.. of the second part, for heirs and assigns, do.. hereby covenant to and with the said, heirs, executors and administrators, that neither the said part.. of the second part, nor heirs or assigns, shall or will at any time hereafter, erect any buildings within forty feet of the front of said lot, except of brick or stone, with roofs of slate or metal, and will not erect or permit upon any part of the said lot, any slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory, or any manufactory of gun powder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery or any other noxious or dangerous trade or business.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

No. 48.

DEED BY A MARRIED WOMAN OF HER REAL ESTATE, UNDER THE ACT OF 1860, CHAPTER 90.

This indenture, made the day of, in the year of our Lord one thousand eight hundred and sixty, between A. B., wife of C. D., of, of the first part, and, of, of the second part, witnesseth: that the said party of the first part, *by and with the assent in writing, of her husband, above named*, and for and in consideration of the sum of, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, remise, release, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel, &c., [set out the description,] together with all the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold the same and every part thereof, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereto set her hand and seal, the day of, in the year of our Lord, one thousand eight hundred and sixty.

Sealed and delivered in
presence of
E. F.

A. B. [L. s.]

Acknowledgment as in No. 10. If the identity of the wife be proved to the officer, the certificate will be modified accordingly, as in No. 8, or some other form. (*Gillet v. Stanly*, 1 Hill, 121; 10 Paige, 342.)

Subjoined or endorsed on the deed should be the assent, in writing, of the husband, which may be in this form:

I, C. D., husband of A. B., the grantor in the above [or the within] deed, do.. by these presents, assent thereto.

In witness whereof, I have hereto set my hand and seal this day of, 1860.

In presence of

C. D. [L. s.]

E. F.

Acknowledgment as in No. 1, if the party be known to the officer; and if not, let his identity be proved.

NOTE. (1.) Although the act of 1860, p. 157, authorizes a married woman to bargain, sell, assign and transfer her separate property, with the assent in writing of her husband, it does not empower her to bind herself by any covenants or warranty. (*Whitbeck v. Cook*, 15 John. 483. *Jackson v. Vanderheyden*, 17 id. 167. *Grout v. Townsend*, 2 Hill, 554. *Teal v. Woodworth*, 3 Paige, 470. *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314.)

(2.) The conveyance, by a married woman, under the acts of 1848 and 1849, (L. of 1848, p. 307; L. of 1849, p. 528,) does not require the assent of the husband, and will, in other respects, be like the above, No. 47, and must be duly acknowledged.

(3.) The act of 1860 does not require the assent of the husband to the conveyance of his wife to be under seal, or to be acknowledged, or proved, or recorded; but it is recommended, as a matter of prudent precaution, that it should be under seal, and be acknowledged or proved, and recorded with the deed.

No. 49.

THE LIKE, WHEN THE ASSENT OF THE HUSBAND CANNOT BE PROCURED BY REASON OF HIS REFUSAL, ABSENCE, INSANITY, ETC., AND LEAVE HAS BEEN GIVEN TO THE WIFE BY THE COUNTY COURT TO MAKE THE CONVEYANCE, WITHOUT THE ASSENT OF THE HUSBAND.

This indenture, &c., same as in No. 48, except instead of the words in italics *by and with the assent of her husband*, insert, in pursuance of the order of the county court of the county of, a copy whereof is hereto annexed, and in consideration of the sum of [the same as in the last precedent.]

CONVEYANCES BY PERSONS ACTING IN AN OFFICIAL OR FIDUCIARY CAPACITY.

No. 50.

SHERIFF'S DEED ON FORECLOSURE OF A MORTGAGE.

This indenture, made the day of in the year one thousand eight hundred and, between..... sheriff of the county of of the first part, and, of the second part: Whereas, at a

..... term of the at the on the day of one thousand eight hundred and, it was, among other things, ordered and adjudged by the said court, in a certain action then pending in the said court between.....: That all and singular the mortgaged premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff.. for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction according to the course and practice of said court, by or under the direction of the sheriff of the county of, that the said sale be made that the said sheriff give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale: that the said sheriff execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same:

And whereas, the said sheriff, in pursuance of the said judgment of the said court, did, on the day of sell at public auction, at the premises in the said judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said judgment; at which sale the premises hereinafter described were struck off to the said part ... of the second part, for the sum of, that being the highest sum bidden for the same.

Now this indenture witnesseth: That the said sheriff of the county of, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said part.... of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said part.... of the second part,..... To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said part.... of the second part, and assigns, to their only proper use, benefit and behoof, for

In witness whereof, the said sheriff, as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in
presence of •

State of New York, County, ss. On the day of one thousand eight hundred and, before me came known to me to be the individual described in, and who executed the above conveyance, and acknowledged that he executed the same.

2 R. S. 191, 192, for practice in the former court of chancery. (Laws of 1847, ch. 280, § 77, page 344.)

No. 51.

THE LIKE, BY REFEREE ON FORECLOSURE

This indenture, made the day of in the year one thousand eight hundred and, between..... a referee duly appointed as hereinafter mentioned, of the first part, and, of the second part:

Whereas, at a term of the..... on the day of one thousand eight hundred and, it was, among other things, ordered and adjudged by the said court, in a certain action then pending in the said court between.....: That all and singular the mortgaged premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff.. for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction according to the course and practice of said court, by or under the direction of the said party of the first part, as referee thereby duly appointed for that purpose: that the said sale be made that the said referee give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale: that the said referee execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be sold, a good and sufficient deed or deeds of conveyance for the same:

And whereas, the said referee, in pursuance of the said judgment of the said court, did, on the day of one thousand eight hundred and sell at public auction, at the premises in the said judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said judgment; at which sale the premises hereinafter described were struck off to the said part... of the second part, for the sum of, that being the highest sum bidden for the same.

Now this indenture witnesseth: That the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said part... of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said part... of the second part,.....

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said part... of the second part, and assigns, to their only proper use, benefit and behoof, for

In witness whereof, the said referee, as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in
presence of

WILL.—38

State of New York, County, ss. On the day of one thousand eight hundred and, before me came known to me to be the individual described in, and who executed the above conveyance, and acknowledged that he executed the same.

No. 52.

DEED OF SPECIAL GUARDIAN, ON THE SALE OF INFANT'S ESTATE, IN PURSUANCE OF THE ORDER OF THE COURT.

This indenture made the day of, in the year one thousand eight hundred and between by special guardian,, infant.. under the age of, of the first part, and of the second part, witnesseth:

Whereas, the above mentioned infant.. by heretofore presented to the court, a petition praying for a sale of the right, title and interest of the said infant.. in the premises in said petition mentioned, and hereinafter described: Upon which petition, an order of the court was made, at a special term of said court, held at in the county of bearing date the day of 18...., appointing above named, the special guardian of such infant.. for the purposes of the said application, and directing that it be referred to, a referee to ascertain the truth of the facts in such petition alleged; and thereupon, after the said special guardian had given the security by law required, such proceedings were afterwards had, that by an order of the said court, made at a special term thereof, held at in the county of, bearing date the day of in the year 18...., it was, among other things, in substance ordered, that the above named, special guardian of such infant..., be authorized to contract for the sale and conveyance of the right, title and interest of the said infant.. in such real estate, for a sum not less than that specified in the referee's report in said order mentioned; and that such sale, with the name of the purchaser, and the terms thereof, be reported to the said court, before the conveyance of such premises should be executed.

And whereas, the said special guardian, upon terms approved of by the said referee, contracted for the sale of the said premises with, for the sum of dollars, that being the highest sum offered for the same; and thereupon, the said guardian made his report on oath of such agreement to this court, pursuant to the requisitions of the last recited order, upon which an order was made, at a special term of said court, held at the in the county of bearing date the day of 18...., confirming such report, approving and confirming such sale, and directing the same to be carried into effect, and ordering the said guardian to execute, acknowledge and deliver a deed of said premises to said party of the second part, on his complying with the terms on which by said agreement the same was to be delivered.

And whereas, the said party of the second part has complied with the said terms, now therefore, this indenture witnesseth, that the said part... of the first part, by special guardian, for and in consideration of dollars, to . . . in hand paid, before the ensembling and delivery of these presents, ha.... bargained, sold, granted, released and conveyed, and by these presents do.... bargain, sell,

grant, release and convey unto the said party of the second part, heirs and assigns forever all with the possession and claim of the part... of the first part, of in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the same, unto the said party of the second part, heirs and assigns, to his and their only benefit and behoof, forever.

In witness whereof, the said part... of the first part, by guardian aforesaid, ha.... hereunto set hand.... and seal the day and year first above written.

Sealed and delivered
in presence of

No. 53.

SHERIFF'S DEED ON THE SALE OF REAL ESTATE, BY VIRTUE OF AN EXECUTION, TO THE PURCHASER.

This indenture, made the day of, in the year of our Lord one thousand eight hundred and, between, sheriff of the county of, of the first part, and, of the second part:

Whereas, by virtue of certain execution.., issued out of the, at the suit of, defendant.., directed and delivered to the said sheriff, commanding him that of the goods and chattels of the said defendant.., he should cause to be made, certain moneys in the said execution specified, and if sufficient goods and chattels could not be found, that then he should cause the amount so specified to be made of the lands, tenements, real estate and chattels real, which the said defendant.. had on a day in the said execution.. mentioned, or at any time afterwards, in whose hands soever the same might be; and the said, in obedience to the command of the said execution.., did levy on and seize all the estate, right, title and interest which the said defendant.. so had, of, in and to the premises hereinafter conveyed and described, and on the day of, one thousand eight hundred and, sold the said premises at public vendue, at, in the said, having first given public notice of the time and place of such sale, by advertising the same according to law, at which sale the said premises were struck off to, for the sum of, being the highest bidder, and that being the highest sum bidden for the same. *

And whereas, the said premises, after the expiration of fifteen months from the time of the said sale, remained unredeemed, and no creditor of the said hath acquired the right and title of the said purchaser, according to the statute in such case made and provided. (†)

Now this indenture witnesseth: That the said party of the first part, as sheriff as aforesaid, by virtue of the said execution.., and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bidden as aforesaid, to him duly paid, hath sold, and by these presents doth grant and convey unto the said part.. of the second part, all the estate, right, title and interest, which the said defendant.. had on the day of, one thousand eight hundred and, or any time afterwards, of, in and to all To have and to hold the said above mentioned and conveyed premises, with the

appurtenances, unto the said part. . of the second part, and assigns, forever, as fully and absolutely as the said party of the first part, as sheriff as aforesaid, can or ought to sell and convey the same, by virtue of the said execution. . , and the law relating thereto.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Scaled and delivered in
presence of

No. 54.

THE LIKE, TO A REDEEMING CREDITOR.

*The same as above, striking out the words between * and †, and substituting the name of the creditor for the grantee, in the deed, and the following recital for the words struck out :*

And whereas the said premises, after the expiration of one year from the time of said sale, remained unredeemed by any person entitled to make such redemption, within that time ; and whereas, O. P., a creditor of the said judgment debtor, having, in his own name, [*or as assignee, or representative, or trustee,*] a judgment in the supreme court, &c., against the said judgment debtor, for the sum of, in a civil action rendered before the expiration of fifteen months from the time of such sale, and which is a lien and charge on the premises so sold, hath acquired all the right of the said, [*the original purchaser,*] to said premises, within the time and in the manner and form prescribed by the statute in such case made and provided ; and no other creditor of the said hath acquired the said rights from or against the said purchaser.

Now this indenture witnesseth ; *as in the last precedent.*

No. 55.

SHERIFF'S CERTIFICATE, ON THE SALE OF REAL ESTATE, GIVEN TO THE PURCHASER.

SUPREME COURT.

A. B.

vs.

C. D.

I, A. B., sheriff of the county of, do certify that, by virtue of an execution in the above cause, tested the day of, 186. . , by which I was commanded to make, of the goods and chattels of C. D., in my bailiwick, dollars, which A. B. had recovered against him in said court, for his damages which he had sustained as well by reason of the not performing certain promises, [*or for the conversion of certain property, as the case may be,*] as for his costs and charges ; and if sufficient goods and chattels could not be found, that then I should cause the said damages to be made of the real estate which the said C. D. had, on the day of, in the year 186. . , or at any time since, in whose hands soever the same might be, as by the said writ of execution, reference being thereafter had, more fully appears, I have levied on and this day sold at public auction, according to the statute in such case made and

provided, to J. K., who was the highest bidder, for the sum of, which was the whole consideration of such sale, the real estate described as follows, to wit: [here set it out;] and that the said sale will become absolute at the expiration of fifteen months from this day, to wit, the day of, 186., and the said purchaser or his assigns be entitled to a conveyance pursuant to law, unless the said land shall be redeemed.

Given under my hand, this day of, 186...

., Sheriff of

(2 R. S. 370. 3 R. S. 651, 652, 5th ed.) A deputy sheriff can sell and give a deed in the name of the sheriff. (*Jackson v. Bush*, 10 John. 223. *Jackson v. Davis*, 18 id. 7.) If the sheriff dies, resigns or is removed from office, the duties of the office devolve on the under sheriff, but the deputies of the late sheriff do not continue in office. (1 R. S. 379, § 72. *Boardman v. Halliday*, 10 Paige, 223.) A deputy who has levied while his principal was in office, may complete the sale after his successor has qualified. (*Jackson v. Collins*, 3 Cowen, 89. *Same v. Tuttle*, 9 id. 233; approved 6 Wend. 213.)

No. 56.

DEED OF EXECUTORS UNDER POWER, CONTAINED IN THE WILL OF THEIR TESTATOR, WITH COVENANT AGAINST THEIR OWN ACTS.

This indenture, made the day of, one thousand eight hundred and, between, of the first part, and, of the second part, witnesseth: Whereas,, late of the of, in the county of, deceased, in lifetime, made and executed last will and testament, bearing date the day of, 18.; whereby, among other things, . . he . . constituted and appointed the said, execut... of said last will and testament; and did thereby empower the said execut... to sell and dispose of the real estate belonging to the said testat... at the time of death.

Now, therefore, this indenture witnesseth: That the said part... of the first part, by virtue of the power and authority to given in and by the said last will and testament, and for and in consideration of the sum of lawful money of the United States of America, to them in hand paid, at or before the en-sealing and delivery of these presents, by the said part... of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do... grant, bargain, sell, alien, release, convey and confirm unto the said part... of the second part, heirs and assigns forever, all Together with all and singular the hereditaments and appurtenances to the same belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testat... had in lifetime, and at the time of decease, and which the said parties of the first part, or either of them, have or hath by virtue of the said last will and testament, or otherwise, of, in and to the same, and every part or parcel thereof, with the appurtenances: to have and to hold the said premises hereby granted and conveyed, with the appurtenances unto the said part... of the second part,

heirs and assigns, to their only proper use, benefit and behoof forever. And the said parties of the first part, for themselves severally and respectively, and for their several and respective heirs, executors and administrators, do severally, and not jointly, nor the one for the other or others of them, nor for the heirs, executors, administrators, or acts or deeds of the other or others of them, but each and every of them, for ..self.. only, and for and their heirs, executors and administrators, and and their several and separate acts and deeds only, covenant, grant, promise and agree to and with the said part.... of the second part, heirs and assigns, that the said part.... of the second part, heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed, to and for own use and benefit, free and clear, of and from all former and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them, the said parties of the first part, or by, through, or with their or either of their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties of the first part to these presents have hereunto set their hands and seals, the day and year first above written.

No. 57.

REFEREE'S DEED IN PARTITION, UNDER AN ORDER OF SALE BY THE COURT.

This indenture, made the day of, in the year one thousand eight hundred and between referee in the action hereinafter mentioned, of the first part, and..... of the second part.

Whereas, at a special term of the court of held at on the day of one thousand eight hundred and it was, among other things, ordered, adjudged and decreed by the said court, in a certain action then pending in the said court, between, that all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the course and practice of said court, by or under the direction of the said, who was appointed a referee in said action, and to whom it was referred by the said order and judgment of the said court, among other things, to make such sale; that the said sale be made in the county where the said premises, or the greater part thereof, are situated; that the referee give public notice of the time and place of such sale, according to law and the course and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee, after said sale, make report thereof to said court, and after his report of sale shall have been duly confirmed, then that he execute to the purchaser or purchasers of the said premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas, the said referee, in pursuance of the order and judgment of the said court, did on the day of one thousand eight hundred and sell at public auction, at, the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first

given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said part.... of the second part, for the sum of dollars, that being the highest sum bidden for the same, and the said referee's report of said sale having been duly confirmed.

Now this indenture witnesseth, that the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said part.... of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said part.... of the second part

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said part.... of the second part. and assigns, to their only proper use, benefit and behoof, for

In witness whereof, the said party of the first part, referee as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in
presence of

No. 58.

DEED OF A RIGHT OF WAY ACROSS THE LANDS OF GRANTOR, FOREVER.

This indenture, made &c., between A. B., of &c., of the first part, and C. D., of &c., of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold and confirmed, and by these presents doth grant, bargain, sell and confirm unto the said party of the second part, his heirs and assigns forever, a right of way in and over a certain strip of land of the said party of the first part, leading from the highway to the lands of the said party of the second part, situate and being in the town of in the county of, for the said party of the second part, his heirs and assigns, and his and their servants and tenants, at all times freely to pass and repass, on foot or with horses, oxen, cattle, sheep, swine, beasts of burden, wagons, carts, sleighs or other vehicle or carriage, whatever, from the highway to the lands of the said party of the second part, and from the lands of the said party of the second part to the said highway; the said strip of land, hereby granted as a way, being in width twenty feet, and beginning at a stake and stones in the west side of the highway which passes through the lands of the said party of the first part, in the town aforesaid, twenty feet from the northeast corner of the land of the said first party, and running thence westerly parallel to the north line of the said land of the said party of the first part, at the distance of twenty feet therefrom, until it strikes the land of the said party of the second part, a distance of sixty rods from the said highway; the said way being in length sixty rods, and in breadth twenty feet.

To have and to hold the said easement and privilege to the said party of the

second part, his heirs and assigns forever, as an appurtenance to the land of the said party of the second part. And the said party of the second part, for himself, his heirs and assigns, hereby agrees to make and keep up the fence on the exterior lines of the said way, at his and their own proper costs and charges, forever. [Insert such covenants as are agreed upon, &c.]

In witness whereof, &c., (as in other cases of deeds. It should be acknowledged and recorded.)

No. 59.

CONVEYANCE BY LEASE AND RELEASE.

This indenture, made &c., between A. B., of &c., of the first part, and C. D., of &c., of the second part, witnesseth: That the said A. B., for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said C. D., his executors, administrators and assigns, all that certain piece or parcel of land, [set out the description fully,] and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, with the appurtenances.

To have and to hold the said lands, tenements and hereditaments, and premises above granted, bargained and sold, and every part and parcel thereof, with the appurtenances, unto the said C. D., his executors, administrators and assigns, from and including the day of the date hereof, for and during and unto the full end and term of one year, and fully to be complete and ended, yielding and paying thereof at the expiration of the said year, one cent, if the same shall be lawfully demanded; to the intent, that by virtue of these presents, and by force of the statute made for transferring uses into possession, he the said C. D. may be in the actual possession of all and singular the said premises above bargained and sold, with the appurtenances, and be thereby enabled to take and accept of a grant and release of the reversion and inheritance thereof to him and his heirs, to, for and upon such uses, interests and purposes as in and by the said grant or release shall be thereof directed or declared.

In witness whereof, &c., as in No. 33.

RELEASE, DATED THE NEXT DAY.

This indenture, made &c., between A. B., of &c., of the first part, and C. D., of &c., of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of, to him in hand paid, at or before the ensembling and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part, (in his actual possession now being by virtue of a bargain and sale to him thereof made for one whole year, by indenture bearing date the day next before the ensembling of these presents, and by force of the statute made for transferring uses into possession,) and to his heirs and assigns forever, all [here set out the description,] and the reversion and reversions, remainder and

remainders, rents, issues and profits thereof, and every part thereof with the appurtenances; and also all the estate, right, title, interest, property, claim and demand whatsoever, in law or equity, of him the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the said premises above in and by these presents released and confirmed, and every part and parcel thereof with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use and behoof, forever: [or to and for such uses, intents and purposes as are hereinafter mentioned, to wit: &c.]

The covenants may be set out here as in a full covenant deed, or such of them as are required, No. 40.

NOTE. 1 R. S. 739, § 142. Id. 727. Of Uses and Trusts.

It is only necessary to have the acknowledgment or proof of the release, and that alone is recorded. The admission of the lease in the release estops parties from denying it. (*Carver v. Jackson*, 4 Peters, 1, 88.)

The lease and release were considered as one instrument in all the New York fee bills. (2 R. S. 637, § 28. 2 R. L. 14. 2 Greenl. 246.)

For form of lease and release, see 2 Black. Com. Appendix, No. 2, §§ 1 and 2, where that mode of conveyance is adopted for a marriage settlement.

No. 60.

DEED OF EXCHANGE OF LANDS, OF AN ESTATE IN FEE SIMPLE, FOR A LIKE ESTATE.

This indenture, made the day of, 186., between A. B., of &c., of the first part, and C. D., of &c., of the second part: Whereas the said party of the first part is seised in fee simple of lot No. 10, in Turner's patent, in the town of Salem, in the county of Washington; and whereas, the said C. D. is seised in fee simple of lot No. 11, in the same patent, adjoining said lot No. 10; and whereas, the said A. B. and C. D. have agreed to exchange with each other the aforesaid premises in fee simple: Now therefore, for the end and purpose aforesaid, this indenture witnesseth, that for and in consideration of the grant and conveyance hereinafter made by the said C. D. to the said A. B., his heirs and assigns; and in consideration of one dollar in hand paid by the said C. D. at or before the sealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, the said party of the first part hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said party of the second part, his heirs and assigns, the said lot No. 10, in Turner's patent aforesaid, together with the appurtenances. To have and to hold the said lot No. 10, to him the said party of the second part, his heirs and assigns forever. And the said party of the first part doth for himself, his heirs, executors and administrators, covenant and agree to and with the said party of the second part, his heirs, executors and administrators, [here insert such covenants as the party of the first part is to give.] And this indenture further witnesseth: That for and in consideration of the said grant and conveyance of the said lot No. 10, by the said party of the first part to the said party of the second part; and also for and in consideration of one dollar to him the said party of the second part paid by the said party of the first part, at or before the sealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, the said party of the second part hath granted, bar-

gained and sold, and by these presents doth grant, bargain and sell unto the said party of the first part, his heirs and assigns forever, the said lot No. 11 in the said patent hereinbefore mentioned. To have and to hold the same, with the appurtenances, to the said party of the first part, his heirs and assigns forever. And the said party of the second part doth for himself, his heirs, executors and administrators, covenant and agree to and with the said party of the first part, his heirs, executors and administrators, [here insert such covenants as are agreed upon.]

In witness whereof the said parties have hereto interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

A. B. [L. s.]

C. D. [L. s.]

E. F.

Acknowledged or proved.

NOTE. See 3 Newnam's Conveyancer, 63 et seq.

No. 61.

A SHORT MORTGAGE, WITH A COVENANT TO PAY, BUT WITHOUT ANY POWER OF SALE.

This indenture, made the day of, in the year one thousand eight hundred and, between, of the first part, and, of the second part:

Whereas, the said, justly indebted to the said part.... of the second part, in the sum of, lawful money of the United States, secured to be paid by certain bond or obligation bearing even date with these presents, in the penal sum of, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum,, as by the said bond may appear.

Now this indenture witnesseth: That the said part.... of the first part, for the better securing the payment of the said sum of money according to the condition of the said bond, and in consideration of one dollar, to in hand paid, the receipt whereof is hereby acknowledged, ha.... granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do.... grant, bargain, sell, alien, release, convey and confirm unto the said part.... of the second part, heirs and assigns forever, all Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, of the said part.... of the first part, of, in and to the same, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: to have and to hold the hereinbefore granted, bargained and described premises, with the appurtenances unto the said part.... of the second part, heirs and assigns, to their only proper use, benefit and behoof forever. Provided always, that if the said part.... of the first part, heirs, executors or administrators, shall pay unto the said part.... of the second part, executors, administrators or assigns, the money mentioned in the condition of the said bond, with the interest as therein specified, then these presents and the said bond shall cease, determine, and be null and void.

And the said, heirs, executors and administrators, do.... covenant

and agree to pay unto the said part. . . . of the second part, executors, administrators or assigns, the said sum of money, and interest as mentioned above, and expressed in the condition of the said bond.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

NOTE. If the mortgage be given for the whole or any part of the purchase money, it is desirable to insert immediately after the description of the premises, something like the following: Being the same premises this day conveyed by the said to the said, and these presents are given to secure the payment of the whole [or part] of the consideration money of said premises—[then proceed as in other cases.]

NOTE (1.) A mortgage, given for the whole or part of the purchase money, has priority over all other liens, whether precedent or subsequent. (Willard's Eq. Jur. 437. 1 R. S. 749, § 5.) The fact that it was given for the consideration money, or a part of it, may be proved by parol; but still, it is advisable to insert the fact in the instrument, to prevent subsequent dispute.

(2.) A mortgage may be given to secure future advances or responsibilities; and in such case the consideration clause should be so modified as to express the fact truly. (Willard's Eq. Jur. 437. *Shirvas v. Caig*, 7 Cranch, 34.) It may be stated thus: "For and in consideration of one hundred dollars, to the party of the first part in hand paid, at or before the ensealing and delivery of these presents, by the party of the second part, and also to secure the payment of one thousand dollars, which the party of the second part has agreed to advance hereafter to and for the use of the said party of the first part, in annual installments of one hundred dollars each, hath granted, bargained," &c.

If the fact be stated any where in the mortgage, it is *notice* to subsequent incumbrancers; and if not so stated, it is good against subsequent incumbrancers, with notice.

No. 62.

COMMON BOND, USUALLY ACCOMPANYING A MORTGAGE.

Know all men by these presents, that I, A. B., of the town of, in the county of, and state of New York, am held and firmly bound unto C. D., of, &c., in the penal sum of five hundred dollars, lawful money of the United States, to be paid to the said C. D., his executors, administrators or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal, and dated this, day of September, 186. . .

The condition of this obligation is such that if the above bounden A. B., his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the above named C. D., his executors, administrators or assigns, the just and full sum of two hundred and fifty dollars, in one year from date, with interest, then the above obligation to be void; otherwise, to remain in full force and virtue.

Sealed and delivered in
presence of

A. B. [L. s.]

C. D.

Acknowledgment as in No. 1.

NOTE (1.) A bond is required to be under the hand and seal of the obligor; and a seal is an impression on wax, or wafer, or some adhesive substance, except it be the seal of a court, a public officer or a corporation. (*Bank of Rochester v. Gray*, 2 Hill, 227. 3 R. S. 687, 5th ed. L. of 1848, ch. 197, § 1.) But this does not extend to private seals, which must be made as heretofore, on wafer, wax or some similar substance. (Id.)

(2.) The penalty of a bond is usually in double the amount of the condition; but a bond is good and can be enforced if the condition and penalty are for the same sum. Interest can be recovered beyond the penalty. (*Lyon v. Clark*, 4 Seld. 148.)

(3.) The above form of bond is the one in general use. But the executors or administrators, though not named, can, on the death of the obligee, enforce payment; and the heirs, executors or administrators, are liable to pay it, on the death of the obligor, if they have assets, whether they are named in the bond or not. (1 R. S. 739, § 141. 3 R. S. 30, 5th ed. Id. 197, 174.)

(4.) A mortgage which does not contain a power of sale cannot be foreclosed at law, by advertisement, under the statute; but can only be foreclosed in a court of equity. (2 R. S. 545, § 1. 3 id. 859, 5th ed. *Doolittle v. Lewis*, 7 John. Ch. 45. *Jackson v. Lockwood*, 7 Wend. 458. *Benedict v. Gilman*, 4 Paige, 58. *Cox v. Wheeler*, 7 id. 248. *Ingraham v. Baldwin*, 5 Seld. 45; 1 Barb. 9, S. C.)

No. 63.

MORTGAGE WITHOUT BOND, BUT CONTAINING A POWER OF SALE AND COVENANT TO PAY THE DEBT.

This indenture, made the day of, in the year one thousand eight hundred and, between, of the first part, and, of the second part:

Whereas,

Now this indenture witnesseth: That the said part.... of the first part, for the better securing the, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to in hand paid, by the said part.... of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, ha... granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do.... grant, bargain, sell, alien, remise, release, convey and confirm unto the said part.... of the second part, and to heirs and assigns forever, all Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part.... of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said part.... of the second part, heirs and assigns, to their own proper use, benefit and behoof forever. Provided always, and these presents are upon this express condition, that if

And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said part.... of the second part, executors, administrators and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said part....

of the first part, heirs, executors, administrators or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney of the said part.... of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money, (if any there shall be,) unto the said, heirs, executors, administrators or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said part.... of the first part, heirs and assigns, and all other persons claiming or to claim the premises or any part thereof, by, from or under them, or either of them.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

No. 64.

MORTGAGE WITH BOND AND POWER OF SALE, PROVIDING THAT THE WHOLE SHALL BECOME DUE ON FAILURE TO PAY AN INSTALLMENT.

This indenture, made the.....day of....., in the year one thousand eight hundred and between of the first part, and of the second part: Whereas, the said justly indebted to the said part... of the second part, in the sum of lawful money of the United States, secured to be paid by certain bond or obligation bearing even date with these presents, in the penal sum of lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of lawful money as aforesaid, to the said part.... of the second part, or assigns, on the..... day of which will be in the year of our Lord one thousand eight hundred and and the interest thereon, to be computed from at and after the rate of per cent. per annum, and to be paid And it is thereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of days, then and from thenceforth, that is to say, after the lapse of the said..... days, the aforesaid principal sum of with all arrearage of interest thereon, shall, at the option of the said part... of the second part, or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, any thing therein before contained to the contrary thereof in any wise notwithstanding,, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth, that the said part... of the first part, for the better securing the payment of the said sum of money mentioned in the condition

of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also, for and in consideration of the sum of one dollar to in hand paid by the said part . . of the second part, at or before the en- sealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha . . . granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do . . . grant, bargain, sell, alien, release, convey and confirm unto the said part . . . of the second part, and to and assigns forever, all Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the es- tate, right, title, interest,, property, possession, claim and demand what- soever, as well in law as in equity, of the said part . . . of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the above granted and described premises, with the appurtenances, unto the said part . . . of the second part, and assigns, to their own proper use, benefit and behoof, forever.

Provided always, and these presents are upon this express condition, that if the said part . . . of the first part shall well and truly pay unto the said part . . . of the second part, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true in- tent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said for do covenant and agree to pay unto the said part . . . of the second part, or assigns, the said sum of money and interest, as mentioned above, and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due there- on, or of any part thereof, that then and from thenceforth, it shall be lawful for the said part . . . of the second part and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said part . . . of the first part, or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney of the said part . . . of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the same premises, rendering the overplus of the purchase money, (if any there shall be,) unto the said of the first part, or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said part . . . of the first part, and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them.

In witness, &c.

No. 65.

MORTGAGE WITH BOND AND POWER OF SALE, WITH COVENANT TO INSURE AGAINST FIRE, AND TO ASSIGN THE POLICY TO MORTGAGEE.

This indenture, made the day of, in the year one thousand eight hundred and, between, of the first part, and, of the second part :

Whereas, the said, justly indebted to the said part... of the second part, in the sum of, lawful money of the United States, secured to be paid by certain bond or obligation, bearing even date with these presents, in the penal sum of, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum,, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth : That the said part... of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also, for and in consideration of the sum of one dollar, to in hand paid by the said part... of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, ha.... granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do.... grant, bargain, sell, alien, release, convey and confirm unto the said part... of the second part, and to and assigns forever, all

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part... of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted and described premises, with the appurtenances, unto the said part... of the second part, and assigns, to their own proper use, benefit and behoof, forever.

Provided always, and these presents are upon this express condition, that if the said part... of the first part,, shall well and truly pay unto the said part... of the second part, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said, for, do.... covenant and agree to pay unto the said part... of the second part, or assigns, the said sum of money, and interest, as mentioned above, and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth, it shall be lawful for the said part... of the second part, and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dis-

pose of the same, and all benefit and equity of redemption of the said part.... of the first part, or assigns, therein, at public auction, according to the act in such case made and provided: and as the attorney of the said part.... of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the same premises, rendering the overplus of the purchase money, (if any there shall be,) unto the said, of the first part, or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said part.... of the first part, and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them.

And it is also agreed by and between the parties to these presents, that the said part.... of the first part, shall and will keep the buildings, erected and to be erected upon the lands above conveyed, insured against loss and damage by fire, by insurers, and in an amount approved by the said part.... of the second part, and assign the policy and certificates thereof to the said part.... of the second part; and in default thereof, it shall be lawful for the said part.... of the second part, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand, with interest at the rate of per cent per annum.

In witness, &c.

NOTE. If this be made to a corporation, the blanks for the mortgagee should be filled with "successors."

No. 66.

MORTGAGE TO EXECUTORS, WITH BOND AND POWER OF SALE, AND COVENANT TO PAY THE DEBT.

This indenture, made the day of, in the year one thousand eight hundred and, between, of the first part, and, execut.... of the last will and testament of, deceased, of the second part.

Whereas, the said justly indebted to the said part.... of the second part, in the sum of lawful money of the United States of America, secured to be paid by certain bond or obligation bearing even date with these presents, in the penal sum of lawful money as aforesaid, conditioned for the payment of the said first mentioned sum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth: That the said part.... of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent

and meaning thereof, and also for and in consideration of the sum of one dollar, to in hand paid, by the said part... of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha... granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do... grant, bargain, sell, alien, release, convey and confirm unto the said part... of the second part, and the survivors and survivor, and their assigns forever, all

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part... of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said part... of the second part, the survivors and survivor, and their assigns, to their only proper use, benefit and behoof forever.

Provided always, and these presents are upon this express condition, that if the said part... of the first part, heirs, executors or administrators, shall well and truly pay unto the said part... of the second part, the survivors or survivor, or their assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be null and void. And the said, for, heirs, executors and administrators, do... covenant and agree to pay unto the said part... of the second part, the survivors or survivor, or assigns, the said sum of money, and interest, as mentioned above, and expressed in the condition of the said bond.

And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said part... of the second part, the survivors or survivor, and their assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said part... of the first part, heirs, executors, administrators or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney or attorneys of the said part... of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money, (if any there shall be,) unto the said, of the first part, heirs, executors, administrators or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said part... of the first part, heirs and

assigns, and all other persons claiming or to claim the premises or any part thereof, by, from or under them, or any of them.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in
presence of

No. 67.

MORTGAGE BY AND TO A CORPORATION, WITH BOND, POWER OF SALE AND COVENANT TO PAY THE DEBT.

This indenture, made the day of, in the year one thousand eight hundred and, between The Albany City Bank, of the city of Albany, of the first part, and The Commercial Bank of Saratoga Springs, of the second part:

Whereas, the said Albany City Bank is justly indebted to the said party of the second part, in the sum of, lawful money of the United States, secured to be paid by certain bond or obligation bearing even date with these presents, in the penal sum of lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this indenture witnesseth: That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also, for and in consideration of the sum of one dollar to it in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said party of the second, and to its successors in office, and assigns forever, all

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever.

Provided always, and these presents are upon this express condition, that if the said party of the first part, or its successors in office, shall well and truly pay unto the said party of the second part, its successors in office or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said party of the

first part, for itself and its successors in office doth covenant and agree to pay unto the said party of the second part, its successors in office, or assigns, the said sum of money and interest, as mentioned above, and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth, it shall be lawful for the said party of the second part, its successors in office and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said party of the first part, its successors in office or assigns therein, at public auction, according to the act in such case made and provided. And as the attorney of the said party of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the same premises, rendering the overplus of the purchase money, (if any there shall be,) unto the said party of the first part, its successors in office or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said party of the first part, its successors in office and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them.

In witness whereof, the said party of the first part, by a resolution of its board of directors, granted the day of, 186., hath caused its corporate seal to be hereunto affixed, and these presents to be subscribed by their president and cashier, the day and year first above written.

C. D., Cashier.

Corporate seal.

A. B., President.

No. 68.

**DEED OF MORTGAGED PREMISES, ON FORECLOSURE BY ADVERTISEMENT,
UNDER THE STATUTE, WHEN THE PURCHASE IS MADE BY A STRANGER
TO THE MORTGAGE.**

This indenture, made the day of, in the year one thousand eight hundred and, between A. B., of, of the first part, and C. D., of, of the second part: Whereas, E. F. by a certain indenture of mortgage bearing date the day of, in order to secure the payment to the said A. B. of the sum of in the manner therein specified, and for and in consideration of the sum of one dollar to him, the said E. F., well and truly paid by the said A. B., did grant, bargain, sell, alien, release, convey and confirm to the said A. B., his executors, administrators and assigns, all that certain piece or parcel of land, [describe the premises,] with the appurtenances; subject to a proviso, in the said mortgage contained, that the same should be void on the payment by the said E. F., his executors, administrators or assigns, of the sum of in the manner particularly specified in the condition of a certain

bond, or writing obligatory, bearing even date with the said mortgage, reference being thereto had will more fully and at large appear; and which said indenture of mortgage contained a special power, authorizing the said A. B., his heirs, executors, administrators or assigns, if default should be made in the payment of the said sum of money mentioned in the condition of the said bond or obligation, with the interest, or of any part thereof, to sell and dispose of the said mortgaged premises, or any part thereof, at public auction; and to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance in the law for the same, in fee simple; and whereas the said indenture of mortgage has been duly recorded, according to law, as by the said indenture of mortgage, and the record thereof, and of the power therein contained, reference being thereto had more fully and at large appears.

[*If it has been assigned, say :* and the same has been duly assigned to the said party of the first part by the said party to whom the said bond and mortgage were given, and which said assignment has been duly recorded, as by the record thereof more fully and at large appears.]

And whereas, default was made in the payment of the said sum of money intended to be secured by the said indenture of mortgage, whereupon the said mortgaged premises hereinafter particularly described, were, on the day of, sold at public auction, to the said party of the second part, for the sum of, being the highest sum bid for the same, public notice having been previously given of such sale by advertisement, inserted and published for twelve weeks, once in each week, successively, in a public newspaper entitled the printed in the town of in the county in which the mortgaged premises are situated, a copy of which was, for twelve weeks prior to the time therein specified for such sale, duly affixed on the outward door of the court house in the town of being the building in which the county courts of said county are directed to be held; and the said party of the first part has caused a copy of said printed notice or advertisement, to be duly served on all persons having any claim upon the said premises, as required by the act of May 7, 1844.

Now therefore, this indenture witnesseth: That the said party of the first part, for and in consideration of the sum so bid as aforesaid, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part, and to his heirs and assigns forever, all; [here describe the premises sold;] together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, as the same are described and conveyed in and by the said indenture of mortgage; and also, all the estate, right, title, interest property, claim and demand whatsoever, both in law and equity, of the said E. F. the mortgagor, as well as of the said party of the first part, of, in and to the above described premises, with the appurtenances, as fully to all intents and purposes as the said party of the first part hath power and authority to grant and sell the same, by virtue of the said indenture of mortgage, and of the statute in such case made and provided, or otherwise. To have and to hold the said above mentioned and described premises, with the appurtenances thereof, unto the said

party of the second part, his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness, &c.

Sealed and delivered in
presence of

NOTES. (1.) The recitals of the mortgage in the deed should be according to the language in the mortgage; which may differ from the above.

(2.) See 2 R. S. 545; L. of 1844, ch. 346, p. 529.; 3 R. S. 859, 5th ed., as to mode of foreclosure at law.

(3.) The power of sale contained in a mortgage is a power coupled with an interest, and does not die with the mortgagor; nor can it be revoked by him, as a mere naked power may be. (*Bergen v. Bennett*, 1 Caines' Cas. in Error, 13, 16 et seq. *Knapp v. Alvord*, 10 Paige, 209. *Osgood v. Franklin*, 2 John. Ch. 19. S. C. 14 John. 527.)

(4.) The mortgagee, or his assigns, may bid in the premises on a statute foreclosure, and in such case no deed is required to be given. (3 R. S. 861, 862, 5th ed. *Jackson v. Colden*, 4 Cowen, 266. *Slee v. Manhattan Co.* 1 Paige, 48. L. of 1838, ch. 266, § 8.) The documental evidence of the sale and purchase, as well as of the publication and service of notice, must be recorded with the county clerk of the county where the lands lie. (Id.)

No. 69.

SATISFACTION OF MORTGAGE.

A mortgage, bearing date the day of eighteen hundred and executed by recorded in the clerk's office of the county of in book of mortgages, page, on the day of, and the bond accompanying said mortgage have been paid, or otherwise satisfied and discharged.

Dated the day of, 18....

In presence of

Acknowledgment or proof, as in other cases.

NOTE. See 1 R. S. 761, § 28; 3 id. 57, § 60, 5th ed. The certificate need not be under seal, nor need there be a subscribing witness, if it be acknowledged; but if not acknowledged at the time, there must be a subscribing witness, by whom it must be proved. It must be recorded at length by the clerk, and a minute of discharge entered on the page of the book containing the record of the mortgage. It may be given by the mortgagee, his personal representatives or assigns. If given by the assignee, the assignment should be recorded also. If by executors or administrators, a certificate by the surrogate that the party discharging the mortgage is such executor or administrator, may be insisted on by the clerk.

COVENANTS.

For the covenants usually inserted in a full covenant deed, see No. 40; for a covenant against grantor's own act, see No. 36; and for various other covenants, see *Agreements*, passim.

No. 70.

GENERAL FORM OF A COVENANT IN A DEED.

And the said party of the part, for himself, his heirs, executors and administrators, doth hereby covenant to and with the said party of the part, his heirs and assigns, [or his executors, administrators and assigns, *as the case requires,*] that &c.

No. 71.

FROM SEVERAL PERSONS TO ONE.

And the said A. B., C. D., and E. F., for themselves severally and respectively, and for their several and respective heirs, executors and administrators, and not jointly, nor the one for the other or others of them, nor for the heirs, executors, administrators, nor for the acts or deeds of the other or others of them, do and each and every of them doth hereby covenant, promise and grant to and with the said L. M., his heirs and assigns, [or his heirs, executors and administrators,] by these presents in manner following.

No. 72.

COVENANT BY LESSEE TO PAY ALL TAXES AND ASSESSMENTS ON THE DEMISED PREMISES.

And the said party of the second part, for himself, his executors, administrators and assigns, hereby covenants to and with the said party of the first part, his heirs and assigns, that he, the said party of the second part, shall and will at his and their proper costs and charges, bear, pay and discharge all such taxes, duties and assessments whatsoever as shall or may, during the said term hereby granted, be charged, assessed or imposed upon the said demised premises.

NOTES. (1.) The executors and administrators, as well as heirs and devisees, are liable for the debts of the deceased, whether they are named in the obligation or not. The executors or administrators are *primarily* liable, and *after* them the heirs and devisees, if lands come to them by descent or devise. (*Butts v. Genung*, 5 Paige, 254. *Schermerhorn v. Barhydt*, 9 id. 28. *Wambaugh v. Gates*, 11 id. 505. 2 R. S. 447 et seq. 3 id. 746, 753, 5th ed.)

(2.) No particular technical words are necessary to make a covenant; but any words which import an agreement between the parties to a deed, will suffice for that purpose. (*Hallet v. Wylie*, 3 John. 48. *Bull v. Follett*, 5 Cowen, 170.) The word "Covenant" is always the appropriate and expressive term, and is most frequently used.

(3.) In conveyances made since 1830, no covenant is implied, whether such conveyance contains special covenants or not. (1 R. S. 738, § 140. *Hone v. Fisher*, 2 Barb. Ch. 569. *Kinney v. Watts*, 14 Wend. 38.)

No. 73.

COVENANT TO REPAIR, DURING THE TERM.

And it is further covenanted that the said party of the *second* part, his executors, administrators and assigns, or some or one of them, at their own proper costs and charges, shall and will from time to time, and all time during the continuance of the

term hereby demised, when, where and as often as need or occasion shall be or require, cause the buildings and fences on the said premises to be well and sufficiently repaired and amended.

No. 74.

COVENANT TO CONDUCT A FARM IN A GOOD HUSBANDLIKE MANNER.

And it is further covenanted, that the said party of the second part, his executors, administrators and assigns, shall and will at all times during the continuance of the said term, manage and conduct the said farm in a good husbandlike manner, and according to the usual course of husbandry in the neighborhood; that he will not commit any waste or damage, or suffer any to be done; that he will keep the fences and buildings on the premises in good repair, reasonable wear thereof and damage by the elements excepted.

No. 75.

COVENANT TO RENEW THE LEASE AT THE EXPIRATION OF THE TERM.

And the said party of the first part, for himself, his heirs and assigns, covenants to and with the said party of the second part, his executors, administrators or assigns, that if the said party of the second part shall well and truly keep and perform the agreements herein contained, he, the said party of the first part, his heirs and assigns, will make and execute unto the said party of the second part a new lease, similar in all respects to this, and to run for the same period, of the premises aforesaid, upon due request and application of the said party of the second part made within *thirty* days prior to the expiration of the said term granted by these presents, [except, here state exceptions, if there be any.]

No. 76.

COVENANT THAT LESSEE MAY HAVE A RIGHT OF WAY, THROUGH LESSOR'S LAND TO THE PUBLIC ROAD.

And inasmuch as the premises hereby demised do not adjoin any public highway, but are wholly surrounded by the lands of the said party of the first part, or of strangers, the said party of the first part, for himself and his heirs and assigns, doth hereby grant to the said party of the second part, his executors, administrators and assigns, during the said term, a right of way in and over a certain strip of land of the said party of the first part, leading from the highway to the lands hereby demised, and which is described as follows: [here set out the description of the land intended as the private way:] over which way the said party of the second part, his servants and tenants, may freely pass and repass, on foot or with horses, oxen, cattle, sheep, swine, beasts of burden, wagons, carts, sleighs or other vehicles or carriages whatever, from the said highway to the said demised premises, at all times during the said term.

EMINENT DOMAIN.

No. 77.

FORM OF A RECORD OF THE ASSESSMENT OF DAMAGES.

(*Adams v. Saratoga and Washington Rail Road Company*, 11 Barb. 414-417.)

"In the matter of the Saratoga and Washington Rail Road Company, and certain owners of lands on the line of their rail road, for appraisement of damages.

Washington county, ss. Whereas by virtue of the act entitled 'An act to incorporate the Saratoga and Washington Rail Road Company,' passed May 2, 1834, the said company were empowered, amongst other things, to purchase, receive and hold such real estate as might be necessary in accomplishing the objects for which the said incorporation was granted, and by their agents, surveyors and engineers, to enter upon and take possession of, and use all such land and real estate as might be necessary for the construction and maintenance of the single or double rail road or way, and the accommodation requisite and appertaining thereto, and to receive, hold and take all such voluntary grants and donations of land and real estate, for the purpose of said road, as should be made to the said corporation to aid in the construction, maintenance and accommodation of the said single and double rail road or way. But, all lands or real estate thus entered upon which were not donations, were required to be purchased by the said corporation of the owner or owners of the same, at a price to be mutually agreed upon between them. And in case of disagreement as to price, and before making any portion of said road on said land, the said corporation, or the owner of said land, might apply by petition to the first judge of the court of common pleas of the county in which said land is situated, who was authorized to proceed to appraise the said lands and damages, in the manner and form directed in and by the act aforesaid. And in case of the inability of said judge to conduct the said proceedings, any other judge of the same court, to whom no reasonable objections were made, was thereby empowered to conduct the same, as by the said act to which reference is hereby made, will more fully appear. And whereas, the lands and real estate, hereinafter described, are necessary for the construction and maintenance of the rail road of said company, and the accommodations requisite and appurtenant thereto. And the said company and John P. Adams, who is the owner of the same, disagree as to the price of the same. And whereas, the said corporation, before making any portion of said road on said land, in and by virtue of the said act, and the several acts amending the same, did, on the 21st day of April, 1847, apply by petition in the manner directed by said act of incorporation, to John McLean, Esq., first judge of the court of common pleas in the county of Washington, in which said lands are situated; who thereupon the same day directed the sheriff of the said county to give public notice in at least one newspaper printed in said county, that at some future day, not less than thirty days from the first publication of said notice, the clerk of said county, and the said judge, would proceed to draw at the clerk's office in said county, the names of twelve persons to serve as a jury between the said rail road company and the owners of lands along and adjoining the line of the rail road of said company, as then located in the county of Washington, with whom a disagree-

ment as to the price of such lands then existed, in appraising said lands and the damages the said owners thereof should individually sustain by reason of their appropriation to the use of said company, in the same manner as the names of the persons were then drawn for juries in courts of record. And whereas, the said sheriff, in pursuance of such directions, on the 21st day of April, did give such public notice for more than thirty days, in manner and form as therein directed, in one of the newspapers printed in said county, called the Washington County Post, and therein appointed the 24th day of May, 1847, at ten o'clock in the forenoon, at the clerk's office of said county, as the time and place of drawing such jury; at which time and place, the said judge and Henry Shepherd, then being the clerk of said county, attended; and in pursuance of such notice, drew the names of twelve persons as such jury, in the same manner as the names of persons were then authorized by law to be drawn for jurors in courts of record, who were duly qualified, and to whom no objections were made, and neither of them resided in any town through which the said rail road passes, or was of kin to any of the said owners claiming damages, or interested in the said rail road, or of kin to those who were interested in said rail road, or said damages. And whereas the said judge, on the 5th day of July, 1847, in pursuance of the act entitled 'an act in relation to the judiciary,' passed May 12th, 1847, did order that the said matter, and all proceedings to be had therein, be transferred to Martin Lee, Esq., who was elected to discharge the duties of county judge of said county, on giving one day's notice of said order; which notice was duly given as therein required. And whereas, the said Martin Lee having taken jurisdiction of said matter, did on the 15th day of July, 1847, by his warrant in writing, duly issued for that purpose, direct said sheriff to summon said jury, and appoint the 10th day of August, 1847, at the hotel kept by Mr. Washburn at Fort Edward, in said county, at 11 o'clock in the forenoon, as the time and place for said twelve persons to be summoned by the said sheriff, to appear as such jury; at which time and place, the undersigned judge appeared, and Daniel T. Payn, Esq., sheriff of the said county, and the said jury who had been duly summoned by the said sheriff also appeared, and in the presence of the parties the said judge duly drew by lot from the said names of the said twelve persons six, who were qualified, and were free from all exceptions, and who were then and there duly sworn well and truly to appraise the lands of certain owners situate along and adjoining the line of the rail road of said company, as then located in the county of Washington, with whom a disagreement as to the price of such lands then existed, and the damages the said owners should sustain by reason of the appropriation of said lands to the use of said company, and a true verdict therein give according to evidence; the names of such jurors so sworn as aforesaid, are hereinafter mentioned.

And thereupon the said matter and proceedings were duly adjourned until the 22d day of September then next, at 2 o'clock p. m. at Bordwell's tavern, near Comstock's landing, in the town of Fort Ann, in said county; at which last mentioned time and place, the undersigned judge appeared, and the said jurors and parties also appeared, and such proceedings were thereupon had that the said matter and proceedings were further adjourned until the 16th day of November then next, at 9 o'clock in the forenoon, at the Phoenix hotel in the town of Whitehall, in the said county; at which last mentioned time and place, the undersigned judge appeared,

and the said jurors and parties also appeared ; and the said jurors were then and there duly sworn well and truly to appraise the lands of the said John P. Adams, situate along and adjoining the line of the rail road of said company, as then located in the town of Whitehall in said county, and the damages the said John P. Adams should sustain by reason of the appropriation of the said lands to the use of the said company, and a true verdict therein give according to evidence. And the said jurors having heard the proofs and allegations of the parties, which were delivered in open court, and in the presence of said parties, a majority of said jurors so sworn as aforesaid, did then and there on the 17th day of November, 1847, duly make up and deliver to the said judge their verdict and award in writing, appraising the said lands and damages aforesaid of the said John P. Adams, at the sum of \$350,00 ; which verdict is in the words and figures following, viz : ' In the matter of the Saratoga and Washington Rail Road Company and John P. Adams. We whose names are hereunto subscribed, and seals affixed, being a jury duly elected, tried and sworn before the Hon. Martin Lee, judge of the county courts in and for the county of Washington, in pursuance of the act entitled 'an act to incorporate the Saratoga and Washington Rail Road Company,' to appraise the lands of the said John P. Adams, situate along and adjoining the line of the rail road of said company, as at present located in the town of Whitehall, in said county, and the damages the said John P. Adams shall sustain by reason of the appropriation of said lands to the use of said company, having heard the proofs and allegations of the parties, do, upon our oaths, appraise the same at \$350,00 ; which said lands are described as follows, viz : All that certain piece of land situate on the farm now occupied by the said Adams, in the town of Whitehall, in said county, and being that part included within the two outward lines of the rail road of the Saratoga and Washington Rail Road Company, as surveyed by James B. Sargent, engineer, in 1847, being a strip two rods in width on each side of the central line of said road, and containing ninety-nine one hundredths of an acre of land. Witness our hands and seals this 17th day of November, 1847. Le Roy Morey, [L. s.] C. V. K. Woodworth, [L. s.] Archibald Moore, [L. s.] Ansell Roberson, [L. s.] John J. Launouth, [L. s.] Pardon Bassett, [L. s.]' And the same was duly certified by the said judge, and filed in the office of the clerk of the said county. And whereas, due proof has been given to the said judge within thirty days after such assessment, that the amount of the same has been deposited to the credit of the said John P. Adams, by said company, in the Bank of Whitehall, being the place directed by said judge for such deposit ; and that all expenses have been fully paid, and at least fourteen days' notice of the time and place of such assessment, was duly given to said John P. Adams ; and all the requirements of the said acts having been fully complied with on the part of said company. Now, therefore, I, the said judge, in compliance with said acts, do order and decree, that the said assessments and proceedings be, and the same are in all respects, hereby ratified and confirmed. To the end that after this decree is recorded in the clerk's office of the said county, the said corporation shall be possessed of the premises and real estate above described in the verdict of said jury, and may enter upon and take possession and use the same for the purposes of said rail road, agreeably to the provisions of the several acts aforesaid. In witness whereof, I have hereunto put my hand and seal this 11th day of December, A. D. 1847. Martin Lee, county judge of Washington county."

No. 78.

EXCEPTION OF A RIGHT OF WAY RESERVED TO THE LESSOR THROUGH THE DEMISED PREMISES, TO ANOTHER LOT OF THE LESSOR.

Excepting and reserving in and out of the hereby demised premises, to the said party of the first part, his heirs and assigns, a right of way, as well a foot way as a horse way, and a way for his and their carts, carriages and servants, in, out and through the hereby demised premises, during the said term, and which said way is described as follows: [here set out the description of it.]

NOTE to No. 76 and 78. If the lessor demises premises which do not touch a public road, but are surrounded in whole by his own land, the law grants a way of necessity through the lessor's land. The proper way, in such a case, is for the lessor, at the time he makes the lease, to designate a way to the lessee. The same principle applies when the piece of land is surrounded in part by the lands of the grantor, and in part by lands of a third person. (*Holmes v. Seeley*, 19 Wend. 507. *N. Y. Trust Co. v. Milnor*, 1 Barb. Ch. 354.)

For an *exception* and *reservation* of a right of way, see *Jackson v. Allen*, 3 Cowen, 221.

LANDLORD AND TENANT.

No. 79.

LEASE WITH SPECIAL COVENANTS.

This indenture, made the day of, in the year of our Lord one thousand eight hundred and, between, of the first part, and, of the second part. Witnesseth: that the said part of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the said part.... of the second part, executors, administrators and assigns, to be paid, kept and performed, ha.... granted, demised and to farm letten, and by these presents do.... grant, demise and to farm let, unto the said part.... of the second part, executors, administrators and assigns, all

To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said part.... of the second part, executors, administrators and assigns, from the day of, one thousand eight hundred and, for and during, and until the full end and term of thence next ensuing, and fully to be complete and ended, yielding and paying therefor unto the said part.... of the first part, heirs or assigns, yearly, and every year during the said term hereby granted, the yearly rent or sum of, lawful money of the United States of America, in equal yearly payments, to wit: on the first day of, in each and every of the said years. Provided always, nevertheless, that if the yearly rent aboved reserved, or any part thereof, shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid; or if default shall be made in any of the covenants herein contained, on the part and behalf of the said part.... of the second part, executors, administrators and assigns, to be paid, kept and performed, then and

from thenceforth it shall and may be lawful for the said part.... of the first part, or assigns, into and upon the said demised premises, and every part thereof, wholly to re-enter and remove all persons therefrom, and the same to have again, re-possess and enjoy, as in their first and former estate, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said part.... of the second part, for heirs, executors and administrators, do.... covenant and agree to and with the said part.... of the first part, heirs and assigns, by these presents, that the said part.... of the second part, executors, administrators or assigns, shall and will yearly and every year during the said term hereby granted, well and truly pay, or cause to be paid, unto the said part.... of the first part, heirs or assigns, the said yearly rent above reserved, on the days and in manner limited and prescribed as aforesaid, for the payment thereof, without any deduction, fraud or delay, according to the true intent and meaning of these presents. And also, that will not, at any time during the term hereby granted, use or suffer to be used, the said premises or any part thereof, for any business or purpose other than that hereinbefore mentioned, without the consent in writing of the said part.... of the first part, heirs or assigns, first had and obtained; also, that will not let or underlet the said premises or any part thereof, nor assign these presents without the like written consent.

And also, that if the yearly rent above reserved, or any part thereof, shall be behind or unpaid on any day whereon the same ought to be paid as aforesaid, or if default shall be made in any or either of the covenants or agreements herein contained on their part, then or in either of such cases it shall and may be lawful for the said part.... of the first part, heirs or assigns, to re-enter said demised premises, without process of law, using all necessary force therefor without liability to prosecution, and may thereupon, as the agent or attorney of the parties of the second part, their executors, administrators or assigns, hereby for that purpose irrevocably constituted and appointed, rent the same, applying the avails first to the payment of the expenses of re-entry, and then to the payment of the rent and other moneys due by these presents, and the balance, if any, to pay over to the said part.... of the second part, executors, administrators or assigns; and also, that on and after the day of next, previous to the expiration of the term hereby granted, shall and will permit a bill or notice to be put up on the said premises, and there remain; and shall and will at all reasonable times in the day, freely permit persons to see and examine the said premises, in order to the selling or renting of the same, until the same be sold or rented.

And it is hereby further covenanted and agreed, by and between the said parties, that the said party of the first part shall, during the said term, use and employ on the said demised premises, all the dung and compost made on the same premises, and carry it out and spread it on the land in a good husbandlike manner, on such parts of the said premises where it is most needed; and after the expiration of the said term, and until the day of, it shall be lawful for the said party of the second part, his executors, administrators and assigns, shall continue to hold and enjoy such arable land on the said premises as is sowed to winter crops of wheat or rye, for the purpose of having the going off crop of wheat or rye therefrom; and the said party of the second part may use

such part of the barn on the said premises as may be necessary to secure and thrash out said crops, [or such other agreement with respect to the outgoing crop as shall be made, but be sure and provide for it.]

And that on the last day of the said term, or other sooner determination of the estate hereby granted, the said part.... of the second part, executors, administrators or assigns, shall and will peaceably and quietly leave, surrender and yield up unto the said part of the first part, heirs or assigns, all and singular the said demised premises.

And the said part.... of the first part, for heirs, executors and administrators, do.... covenant and agree to and with the said part.... of the second part, executors, administrators and assigns, by these presents, that the said part.... of the second part, executors, administrators or assigns, paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid on their part, the said part.... of the second part, executors, administrators and assigns, shall and may at all times during the said term hereby granted, peaceably and quietly have, hold and enjoy the said demised premises, without any manner of let, suit, trouble or hinderance of or from the said part.... of the first part, heirs or assigns, or any other person or persons whomsoever.

[Here insert such other special covenants as may be agreed on, and insert a provision in case of the buildings being destroyed by fire, or the elements.]

(See Covenants.)

In witness whereof, &c.

NOTES. (1.) Previous to 1846 it was usual in leases to reserve a right of re-entry to the landlord, in case no sufficient distress could be found on the premises to satisfy the rent due. The act of 1846, p. 369, abolished distress for rent, and substituted a fifteen days' notice from the landlord, of his intention to re-enter, for proof of a want of sufficient distress. In leases made since the abolishing of the remedy by distress, the clause with respect to distress is omitted. (See *Van Rensselaer v. Snyder*, 3 Kernan, 299; *Williams v. Porter*, 2 Barb. S. C. R. 316.)

(2.) If the lease or grant be of agricultural land, and reserve a rent or service of any kind, it is void if it be for a longer period than twelve years. (Constitution, Art. 1, § 14.)

(3.) In lieu of the remedy by distress, leases now frequently contain a chattel mortgage of specified articles, as in No. 79. To be valid against creditors and subsequent purchasers, it should be filed as required by law. (L. of 1833, ch. 279, § 1, 2, 3. 3 R. S. 233, 5th ed.)

(4.) A parol lease, for a term not exceeding one year, is valid; and it is valid though made to take effect at a future day. (2 R. S. 134, § 6. *Young v. Dake*, 1 Seld. 463. *Taggard v. Roosevelt*, 2 Smith's Com. Pl. R. 100, overruling *Croswell v. Crane*, 7 Barb. 191.)

(5.) Agreements for the occupation of lands or tenements in the city of New York, which do not particularly specify the duration of such occupation, are deemed valid until the 1st day of May next after the possession under the agreement, and the rent, unless otherwise expressed, is payable at the usual quarter days. (L. of 1820, p. 178, § 4. 1 R. S. 744, § 1. 3 id. 34, 5th ed.)

(6.) Gas fixtures and sitting stools, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between the tenant and his landlord. (*Lawrence v. Kemp*, 1 Duer, 363.)

(7.) The landlord is in no case bound to repair unless by force of an express covenant or contract. (*Howard v. Doolittle*, 3 Duer, 464.) Hence the necessity for providing for all contingencies by appropriate covenants.

The lease should contain a provision in relation to fixtures, if the parties wish to have a rule different from that established by law.

No. 80.

A SHORTER FORM OF A LEASE, CONTAINING A CHATTEL MORTGAGE AS SECURITY FOR THE RENT.

A lease, made and executed between, of the first part, and, of the second part, the day of, in the year of our Lord one thousand eight hundred and

In consideration of the rents and covenants hereinafter expressed, the said party of the first part ha demised and leased, and do hereby demise and lease to the said party of the second part, the following premises, viz: [here insert a description of the premises,] with the privileges and appurtenances, for and during the term of, from the, which term will end And the said party of the second part, covenant.. that ..he.. will pay to the party of the first part, for the use of said premises, rent of dollars, to be paid

And it is hereby agreed, that the said party of the first part shall have a lien as security for the rent aforesaid upon the following goods and chattels, to wit: [here insert the property intended to be mortgaged,] and also upon all the goods, wares, chattels, implements, fixtures, tools and other personal property which are or may be put on the said demised premises, and such lien may be enforced on the non-payment of any the rent aforesaid, by the taking and sale of such property in the same manner as in cases of chattel mortgage on default thereof; said sale to be made upon six days' notice, posted upon the demised premises, and served upon the party of the second part, or left at place of residence.

And provided said party of the second part shall fail to pay said rent, or any part thereof, when it becomes due, it is agreed that said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.

The party of the part agree.. to pay all taxes to be assessed on said premises during said term. [Here insert such covenants as are agreed upon.]

The party of the second part covenants that at the expiration of said term, he will surrender up said premises to the party of the first part, in as good condition as now, necessary wear and damage by the elements excepted.

Witness the hands and seals of the said parties the day and year first above written.

(See notes under No. 79.)

 No. 81.
A SHORT FORM OF A TENANT'S AGREEMENT, WITH THE CORRESPONDING ONE OF THE LANDLORD, USED IN NEW YORK, CONTAINING THE CROTON WATER, AND FIRE CLAUSE, AND VARIOUS OTHER COVENANTS—ALSO THE AGREEMENT OF THE SURETY FOR THE TENANT.**LANDLORD'S AGREEMENT.**

This is to certify that have let and rented unto, [here insert the name of the tenant and a description of the premises rented,] for the term of from the day of, 18., at the rent of dollars, payable, [here insert the terms of payment.]

The tenant.. promise.. to make punctual payment of the rent in manner aforesaid, and to quit and surrender the premises, at the expiration of said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and engage.. not to let or underlet the whole or any part of the said premises, without the written consent of the landlord, under the penalty of forfeiture and damages; and also not to use or occupy the said premises for any business deemed extra hazardous, on account of fire, without the like consent, under the like penalty.

And also to pay the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises, for the Croton water; on or before the first day of August in each year during the term, and if not so paid, the same to be added to the quarter's rent then due.

And the said tenant also agrees to permit the landlord or agent, to show the said premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, to place the usual notice of "to let" or "for sale," upon the walls or doors of said premises, and remain thereon without hinderance or molestation. And also that if the said premises, or any part thereof, shall become vacant during the said term, the said landlord or representative may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and re-let the said premises as the agent of the said tenant, and receive the rent thereof, applying the same, first to the payment of such expense as may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance (if any) to be paid over to the said tenant, who shall remain liable for any deficiency.

And it is further agreed between the parties to these presents, that in case the premises above mentioned shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the said landlord; that in case the damage shall be so extensive as to render the premises untenable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth, this agreement shall, at the option of the said tenant, cease and come to an end.

[Here insert any other covenants which may be desired.]

Given under hand.. and seal.. the day of, 18...

TENANT'S AGREEMENT.

This is to certify that have hired and taken from, [here insert the name of the landlord and the description of the premises,] for the term of from the day of, 18., at the rent of dollars, payable And hereby promise.. to make punctual payment of the rent in manner aforesaid, and to quit and surrender the premises at the expiration of the said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and engage not to let or underlet the whole or any part of the said premises, without the written consent of the landlord, under the penalty of forfeiture and damages; and also not to use or occupy the said premises for any business deemed extra hazardous, on account of fire, without the like consent, under the like penalty.

And also to pay the regular annual rent or charge, which is or may be assessed

or imposed according to law, upon the said premises, for the Croton water; on or before the first day of August, in each year during the term, and if not so paid, the same shall be added to the quarter's rent then due.

And also agree to permit the landlord or agent, to show the said premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, to place the usual notice of "to let" or "for sale," upon the walls or doors of said premises, and remain thereon without hinderance or molestation. And also, that if the said premises or any part thereof, shall become vacant during the said term, the said landlord, or representatives may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and re-let the said premises as the agent of the said tenant, and receive the rent thereof, applying the same, first to the payment of such expenses as may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance (if any) to be paid over to the tenant, who shall remain liable for any deficiency.

And it is further agreed between the parties to these presents, that in case the premises above mentioned shall be partially damaged by fire, the same shall be repaired as speedily as possible, at the expense of the said landlord; that in case the damage shall be so extensive as to render the premises untenable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this agreement shall, at the option of the said tenant, cease and come to an end.

[Here insert the same covenant as is contained in the counterpart.]

Given under my hand and seal &c.

In consideration of the letting of the premises above described, and for the sum of one dollar, hereby become surety for the punctual payment of the rent, and performance of the covenants, in the above written agreement mentioned, to be paid and performed by, and if any default shall be made therein, hereby promise and agree to pay unto, such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made.

Given under hand.. and seal.. the day of, 18...

(See notes under No. 79.)

No. 82.

A SHORT FORM OF A LANDLORD'S AGREEMENT FOR A LEASE OF A SINGLE ROOM, IN A TENEMENT OF THE LANDLORD.

This is to certify that I have this day let and rented unto E. F., room No. 3, on the second floor of my tenement or house known as No. in street, in the city of [or village of], with the privileges of using the front and rear stairs for ingress and egress, and of using the privy in the rear, for one year, to commence on the day of, at the yearly rent of dollars, payable quarterly.

Witness my hand and seal this day of 18....

In presence of

A. B. [L. s.]

(See notes under No. 79.)

TENANT'S AGREEMENT ON ACCEPTING THE SAME.

This is to certify, that I have hired and taken from A. B. room No. 3, on the second floor of his tenement or house known as No., in street, in the city of [or village of], with the appurtenances, with the privilege of using the front and rear stairs for ingress and egress, and of using the privy in the rear, for the term of one year, to commence the day of, at the yearly rent of, payable quarterly. And I do hereby covenant and promise to make punctual payment of the rent in manner aforesaid, except the premises become untenable from fire or any other cause, when the rent is to cease. And I do further promise to quit and surrender the premises at the expiration of the term in as good state and condition as reasonable use and wear thereof will permit, damage by the elements excepted. †

Given under my hand and seal the day of 186...

In presence of

E. F. [L. S.]

NOTE. If other covenants are desired, they can be inserted at the †, the form of the most usual of which will be found in the preceding forms.

MARRIAGE SETTLEMENTS.

No. 83.

ANTE-NUPTIAL SETTLEMENT OF PERSONAL PROPERTY.

This indenture of three parts, made and concluded this day of 1860, between Jane Doe, of the town of, in the county of and state of New York, of the first part, John Doe, of the same place, of the second part, and James Jackson, of the town of, in the county of, and state aforesaid, of the third part, witnesseth: That whereas, a marriage is intended, by the permission of God, to be shortly had and solemnized between the said parties of the first and third part, and the said party of the first part is possessed of certain personal estate, to wit: the sum of five thousand dollars, secured by the bond and mortgage of one L. M., [here describe it.] Now therefore, in consideration of the premises, and of one dollar paid by the said John Doe to the said party of the first part, the receipt whereof is hereby confessed and acknowledged, the said party of the first part doth hereby assign, transfer and set over to the said party of the second part the aforesaid bond and mortgage, and the moneys due and to become due thereon, to hold by him upon the special trusts, and the uses and purposes hereinafter expressed, to wit:

First. That until the solemnization of the said marriage, the said party of the second part shall pay over to the said party of the first part, for her own use, all the interest that shall arise and be due on the said bond and mortgage, and such of the principal as shall be paid to him, and from any other estate which may be substituted therefor, as is hereinafter provided.

Second. That from and after the solemnization of the said marriage, and during the coverture of the said party of the first part, the said party of the second part shall receive and collect the interest due and to become due on the said bond and mortgage, and such installments of the principal as shall become payable and be paid, and after deducting all individual expenses, shall pay over the same, or so much thereof as she shall not direct to be invested for accumulation, to the said party of the first part, upon her sole and separate receipt therefor, and free from the control or interference of her husband, or any other person whomsoever.

Third. Should the said party of the first part depart this life after the solemnization of the said marriage, and during the life of her said husband, the party of the third part, the said bond and mortgage and any other money or effects growing out of this trust, shall be transferred and set over by the said trustee, the party of the second part, to such person or persons as she, the said party of the first part, by an instrument in writing, in the nature of a last will and testament, duly executed as wills of personal estate are by law required to be executed, shall order and appoint to receive the same; and in default of making such appointment the same shall be transferred and paid to her husband, the said party of the third part; and in case of his decease before the said property shall be actually transferred and paid over to him, then to such person or persons as would be the legal representatives of the said party of the first part, by the statute for the distribution of the estates of intestates.

Fourth. That in case of the decease of the said party of the third part (the husband) during the lifetime of the said party of the first part, all the property then held in trust under this indenture shall be transferred and conveyed to the said party of the first part; and until so transferred, the whole income thereof shall be paid to her for her own use.

Fifth. That the said party of the second part, the trustee, shall have power at the request of the said party of the first part, expressed in writing, subscribed by her or by her authority, to sell and assign the said bond and mortgage; or to receive any portion of the principal and invest the same in other securities, according to such written direction of the said party of the first part; and the property so purchased, and the investment so made, shall be had and held by the trustee upon the same trusts, and for the same purposes as aforesaid.

Sixth. That in case of the termination of the authority of the said trustee by his death, resignation or removal, the whole trust fund held by him shall be delivered over to such person or persons as may be appointed, in writing, by the party of the first part, to be the trustee under this indenture, or by any court having jurisdiction thereof; and the receipt of such new trustee, for the trust property, shall be a sufficient discharge of the said party of the second part, his executors and administrators; and in like manner other new trustees may be appointed from time to time, as occasion may require.

And the said party of the second part hereby accepts the said bond and mortgage, and engages to hold and manage the same upon the trusts herein mentioned.

And the said party of the third part doth hereby signify his assent to the provisions of this indenture, and hereby covenants with the party of the second part, and his successors in the said trust, to permit the said party of the first part, after the solemnization of the said marriage, to receive the aforesaid interest and principal of the said bond and mortgage to her sole and separate use, and freel to dispose

of the trust estate by her will, or testamentary appointment at her death, and not to interfere with the said trust estate, otherwise than in conformity to the provisions of this indenture.

In witness whereof, the said parties have hereto set their hands and seals, the day and year above written.

Sealed and delivered in
presence of

JANE DOE. [L. s.]

JOHN DOE. [L. s.]

JAMES JACKSON. [L. s.]

[Acknowledgment.]

NOTES. (1.) As upon the death of a sole surviving trustee of an express trust, the trust estate does not descend to his heirs, or pass to his personal representatives, it seems improper in conveying the trust property to the trustee, to add words of limitation. (1 R. S. 730, § 68.)

(2.) There should be triplicates of the above instrument, executed by all the parties, one of which should be kept by each. As a matter of prudence, it should be recorded by the clerk of the county among miscellaneous records.

No. 84.

ANTE-NUPTIAL SETTLEMENT OF REAL ESTATE BELONGING TO THE INTENDED WIFE, RESERVING A GENERAL POWER OF DISPOSITION IN HER, THE ENTIRE LEGAL ESTATE BEING VESTED IN THE TRUSTEES.

This indenture of three parts, made and concluded this day of, 186.., between H. A. W., of the town of, &c., of the first part, [the intended husband,] L. A., of, &c., [the intended wife,] of the second part, and T. L., of, &c., of the third part, [the trustee.] Witnesseth: That whereas, a marriage is intended, by the permission of God, to be shortly had and solemnized between the said parties of the first and second part, and the said party of the second part is seised and possessed of a large estate, situate and being, &c., and it is agreed by and between her and the said party of the first part, that the said estate should be settled upon the trusts and for the purposes hereinafter declared. Now, therefore, in consideration of the said intended marriage, and of the sum of one dollar to the said party of the second part paid, by the said party of the third part, the receipt whereof is hereby confessed and acknowledged, the said party of the second part hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said party of the third part, his successors and assigns, all that, [here describe the property,] to have and to hold the said tenements and hereditaments, with their appurtenances, unto the said party of the third part, his successors and assigns, to such uses and purposes as are hereinafter mentioned, to wit: For the use and benefit of the said party of the second part, until her said intended marriage shall take place, and from and after the solemnization thereof, then upon trust, from time to time to apply to the use of the said party of the second part, all the interest, dividends and annual produce thereof during the joint lives of the said parties of the first and second part, to her own proper use and benefit, and upon her own proper receipt for the same, notwithstanding her coverture, to the intent that the same may not be at the disposal or under the control of the said party of the first part, or in any manner subject to his debts and engagements; and from and immediately after the decease of the said party of the first part, [the husband,] in case the said party of the second part, [the wife,] shall survive him, then upon trust for the use

and benefit of the said party of the second part, her executors, administrators and assigns, and upon trust in such case to grant and convey the trust estate and every part thereof to the said party of the second part absolutely, or to grant and convey the same to such person or persons as she, by any writing to be by her duly executed, may limit, direct and appoint. But in case the said party of the first part shall survive the said party of the second part, then upon trust, from and immediately after her decease, to apply to the use of the said party of the first part, all the interest, dividends and annual produce thereof, from time to time, during his natural life, to and for his own use and benefit; and on the decease of the said party of the first part, to pay and divide the capital or principal of the said trust fund, and to grant and convey all her real estate to and among the lawful children of the said party of the second part, and their issue, in such proportions, shares, manner and form as she, by any writing under her hand subscribed in the presence of two or more witnesses, shall direct and appoint; and for want of such appointment, to and among the said children of the said party of the second part, and the lawful issue of such of them as may be deceased, according to the rules of descent and of distribution in cases of intestacy. But if there be no issue of the said party of the second part then surviving, then, upon trust, to pay and dispose of the said capital or principal, and grant and convey the said real estate according to the direction and appointment of the said party of the second part, and for want of such appointment, to and among her then surviving nephews and nieces, children of her sisters and the lawful issue of such of them as may be deceased, according to the like rule of descent and distribution. †

In witness whereof, &c., as in No. 83.

NOTE. The above is taken from the case of *Wright v. Talmadge*, (15 N. Y. Rep.) 308 and 309, which was held by the court of appeals to be a valid marriage settlement under the revised statutes. See remarks of Denio, J., on the same.

No. 85.

A POWER TO TRUSTEES TO SELL AND REINVEST THE SAME.

Add, at the † in No. 84, as follows: And the said party of the second part doth hereby grant and agree that the said party of the third part, upon the written request of her the said party of the second part, may grant and convey the whole or any designated portion of the said estate upon such terms as she shall direct, and receive the consideration money therefor, and invest the same for the like uses and purposes hereinbefore declared with respect to the original trust.

No. 86.

CLAUSE IN WHICH THE REAL ESTATE COMES FROM THE HUSBAND, AND IS INTENDED, AFTER HIS DEATH, TO GO TO THE WIFE FOR A JOINTURE.

To the use of the said party of the first part, [the intended husband,] for and during the term of his natural life, without impeachment of waste, and from and after his decease, then to the use and behoof of the said party of the second part [the intended wife] for and during the term of her natural life, in name of her jointure, and in full recompense and satisfaction of her dower, which she the said party of the second part should or ought to have in or out of the lands, tenements

or hereditaments of the said party of the first part, whereof the said party of the first part hath, or hereafter shall have, during the coverture between him and her, any estate of inheritance.

NOTE. 3 Newnam's Conveyancer, 230. 1 R. S. 741, §§ 9, 10, 11. A *pecuniary* provision for the benefit of the intended wife, in lieu of dower, is equally effective, if assented to by her.

No. 87.

**ANTE-NUPTIAL SETTLEMENT OF THE REAL ESTATE OF THE INTENDED WIFE
TO THE USE OF HERSELF AND HER INTENDED HUSBAND FOR LIFE, WITH
CONTINGENT REMAINDERS TO THEIR ISSUE, WHICH OPEN TO LET IN AF-
TER-BORN CHILDREN.**

This indenture, made the day of 1860, between M. P., of &c. of the first part, [the intended wife,] R. M., [the intended husband,] of &c., of the second part, and I. P. and B. R., of &c. [the trustees,] of the third part, witnesseth: That in consideration of a marriage intended to be had and solemnized between the said parties of the first and second part, and the settlement hereafter made by the said party of the second part on the said party of the first part, and for and in consideration of the sum of one dollar by the said parties of the third part, at or before the ensealing and delivery of these presents, well and truly paid, the receipt whereof is hereby acknowledged; and for divers other good causes and considerations her the said party of the first part thereunto moving, she the said party of the first part hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said parties of the third part, [the trustees,] and to their heirs, all and singular, [here describe the estate conveyed.]

To have and to hold the above granted and bargained premises, and every part thereof, unto the said parties of the third part, and their heirs, to and for the several uses, intents and purposes hereinafter declared, expressed, limited and appointed, and to and for no other use, intent and purpose whatsoever; that is to say, to and for the use and behoof of the party of the first part, until the solemnization of the intended marriage, and to the use and behoof of the said parties of the first and second part, and the survivor of them, for and during the term of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns forever: but in case the said parties of the first and second part shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said parties of the first and second part, and the said party of the first part should survive the said party of the second part without issue, then to the use and behoof of her the said party of the first part, and her heirs and assigns forever: and in case the said party of the second part should survive the said party of the first part, without any issue by her, or that such issue is then dead without leaving issue, then, after the decease of the said party of the second part, to the only use and behoof of such person or persons, and in such manner and form, as she, the said party of the first part, shall at any time during the said intended marriage, devise the same by her last will and testament; which last will and testament, for that purpose, it is hereby agreed by all the parties to these

presents, that it shall be lawful for her, at any time during the said marriage, to make, publish and declare, the said marriage or anything herein contained to the contrary thereof in anywise notwithstanding: provided nevertheless, and it is the true intent and meaning of the parties to these presents, that it shall and may be lawful to and for the said parties of the first and second part, jointly at any time or times during the said marriage, to sell and dispose of any part of the said several lots or parcels of land, or of any other her lands, tenements, hereditaments and real estate to the value of ; and in case the said sum of be not raised by such sale or sales, during their joint lives, and they have issue between them, that then it shall be lawful for the survivor of them to raise the said sum, by the sale of any part of the said lands, or such deficiency thereof as shall not then have been already raised thereout, so as to make up the said full sum of anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

[Here insert the settlement of the husband upon the wife as agreed.]

In witness whereof, &c.

Sealed and delivered in
presence of

The above is taken, with a slight variation, from the marriage settlement between Mary Phillipse and Roger Morris, made in 1758, which was held to be valid by all the courts. (4 Peters' U. S. Rep. 1-7.) See remarks of Story, J. thereon at page 90 et seq.

No. 88.

ANTE-NUPTIAL AGREEMENT, WITHOUT THE INTERVENTION OF TRUSTEES, RESERVING A POWER OF DISPOSITION BY WILL AND OTHERWISE IN THE WIFE, DURING COVERTURE.

This indenture, made the day of, 186., between John Doe, of, &c., of the first part, and Elizabeth Jackson, of, &c., of the second part. Whereas, a marriage is intended to be shortly had and solemnized between the said parties, and whereas the said parties are respectively seised and possessed of a very considerable real and personal estate, and it has been mutually agreed by and between the said parties that their respective property, both real and personal, which they shall have and be entitled to at the time of the consummation of their said intended marriage, shall be and remain after the said marriage as it was before, the individual and separate property of the party to whom it belonged, at the time of the said marriage. Now, therefore, this indenture witnesseth, that the said parties, in consideration of the said intended marriage, and of the premises hereinafter mentioned, have granted, covenanted and agreed to and with each other and their respective heirs, executors and administrators, and by these presents do grant, covenant and agree to and with each other, their respective heirs, executors and administrators, that the respective property of each of the said parties, both real and personal, of every kind, character and description, which either of the said parties shall have or be entitled to at the time of the said intended marriage, shall be and remain after the said marriage, as it was before, the individual and separate property of that party to whom it belonged at the time of the marriage, and not

in any manner to be affected thereby; and that all the property, both real and personal, acquired by either party, by gift, devise, legacy, by his or her earnings, or by any other means whatever, after the said marriage, shall be and remain the individual and separate estate and property of the party so acquiring it, in the same manner and to the same extent as if such marriage had not taken place; that the said party of the first part shall not be entitled to an estate by the curtesy in any real estate of which the said party of the second part is now or may hereafter be seised; and the said party of the second part, if she survives the said party of the first part, shall not be entitled to be endowed in any of the estate of which he may be seised at any time during the coverture.

And the said parties do further mutually agree that they shall respectively have the right and liberty of disposing of their individual and separate property, both real and personal, and to purchase other property at their discretion, without the assent of the other, as fully as they might do if sole and unmarried; and that neither party shall, by virtue of the said marriage, acquire any right or title in the property or estate, or earnings of the other. And it is further agreed that the said party of the second part shall, at all times during the said coverture, have full power effectually to dispose of according to her pleasure, by will or by an instrument in writing in the nature of a will, all such real or personal estate as she may be seised or possessed of in her own right, or in conjunction with others, in the same way as if she was a feme sole.

And it is further mutually agreed by and between the said parties, that if either of the said parties dies intestate, the whole real and personal property of the party so dying shall pass to the survivor, his or her heirs and assigns, [or shall descend to the heirs and next of kin of such party, according to the law of descents, and for the distribution of estates in cases of intestacy.]

In witness whereof, the said parties have hereto set their hands and seals the day and year above written.

Sealed and delivered in
presence of

JOHN DOE. [L. S.]
ELIZABETH JACKSON. [L. S.]

It should be acknowledged and recorded.

The validity of such a settlement was declared, by Chancellor Kent, in *Bradish v. Gibbs*, (3 John. Ch. R. 523,) and by the supreme court, in *Strong v. Skinner*, (4 Barb. 546, 554. L. of 1849, ch. 375, § 3.) "Contracts, made between persons in contemplation of marriage, shall remain in full force after such marriage takes place." (Id.) L. 1860, ch. 90, p. 157.

The foregoing ante-nuptial agreement gives to the woman, after marriage, greater power of disposition than the act of 1860.

It is generally deemed advisable to vest the estate in a trustee, in the case of marriage settlements; but it is not indispensable. (*Blanchard v. Blood*, 2 Barb. S. C. R. 354; 2 Story's Eq. Jur. 607, § 1380; 2 Kent's Com. 162.)

An executory contract of a wife, made under such a power as is given by this settlement, can be enforced against the wife. (*Van Allen v. Humphrey*, 15 Barbour, 555.)

For form of an ante-nuptial settlement, by French law, see *Le Breton v. Miles*, (8 Paige, 262,) et seq. where one is set out at length.

No. 89.

POST-NUPTIAL SETTLEMENT OF THE ESTATE OF THE WIFE, CONVEYED BY HER AND HER HUSBAND TO A TRUSTEE, FOR CERTAIN TRUSTS IN WHICH HER INTEREST IS INALIENABLE.

The usual deed from the husband and wife to H. F. B., the trustee, of certain real estate of which the wife is seised in fee, [describing it,] and then proceed:

"To and for the several uses, intents and purposes, and upon the trusts herein-after mentioned and expressed concerning the same; that is to say, in trust, in the *first* place, to pay out of the rents, income and profits of the said premises, the interest accruing and to accrue upon the aforesaid mortgages and other incumbrances; in the *next* place, to pay thereout all necessary taxes and assessments upon the said premises; and in the *next* place, to pay thereout all necessary expenses incurred in the needful repairs and insurance of the buildings erected on the said premises, and after the payment of the said interest and assessments, and expenses thereto, to pay the remainder of the said rents, income, profits and proceeds, to the said Ann Maria, [the wife,] upon her own separate receipt, notwithstanding her coverture, to the intent and purpose that the same, or any part thereof, may not be at the disposal of, or subject to the control, debts, liabilities or engagements of the said H. B., [the husband,] or of any future husband she may have, but at her sole and separate use and disposal; and upon this further trust, upon the decease of the said Maria during her coverture with the said H. B., or any other future husband she may marry, to appropriate the said proceeds, (after deducting the outgoings aforesaid,) and to apply and dispose of the same in such manner as the said Ann Maria, [the wife,] shall, by her last will and testament duly executed, direct and appoint, and in default of such appointment, then to apply the said proceeds towards the maintenance and education of the child or children of them, the said H. B. and Ann Maria, until they shall arrive at age or, if females, be married, if any such children there be living at her decease; and if no child or children shall be then living, then to pay the same to the said H. B., [the husband,] during his life; and it is hereby declared and agreed by and between all the said parties to these presents, that the said Ann Maria shall have power, during her coverture with the said H. B., or with any other future husband she may marry, to devise the said pieces or parcels, or lots, of ground and premises, by her last will and testament, in the same manner as though she were a feme sole and unmarried; and the said party hereto of the second part, [the trustee,] is hereby empowered to use all necessary ways and means for the recovery of the rents and profits of the said premises, and to reimburse himself all necessary expenses in the execution of the trust hereby reposed in him; and it is hereby further declared and agreed, that upon the death of the said H. F. B., [the trustee,] the party of the second part, if the same should happen before the decease of the said Ann Maria, she, the said Ann Maria, shall be and is hereby empowered to appoint one or more trustees in the place and stead of the said H. F. B., party hereto of the second part, and also shall be and hereby is empowered to appoint any new trustees in the place and stead of those, at any time so to be appointed, such newly appointed trustees to be invested with the same powers, and to hold the same premises upon the same trust as hereinbefore set forth."

The above is taken from *Noyes v. Blakeman*, 3 Sandf. S. C. R. 532, et seq., which

was finally passed upon by the court of appeals, in 2 Seld. 567. See remarks of the judges on the same, showing that the trust estate of the wife was inalienable, under the revised statutes.

(1 R. S. 729, § 60, 63.)

No. 90.

POWER OF ATTORNEY TO CONVEY REAL ESTATE, WITH A POWER OF SUBSTITUTION.

Know all men by these presents, that I, A. B., of, have made, constituted and appointed, and by these presents do make, constitute and appoint C. D., of, my true and lawful attorney for me and in my name, place and stead to enter upon and take possession of all such lands, tenements, hereditaments and real estate whereof I am seised or possessed, or entitled unto, in the state of New York, or in which I have any interest; and to grant, bargain and sell the same, or any part or parcel thereof, for such sum or price, and on such terms as to him shall seem proper; and for me and in my name to make, execute and acknowledge, and deliver good and sufficient deeds and conveyances for the same, either with or without covenants and warranty; and until the sale thereof, to let and demise the said real estate, or any part thereof, for the best rent that can be procured for the same; and to ask, demand, collect, recover and receive all sums of money which shall become due and owing to me by means of such bargain and sale, or lease and demise; hereby giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done, by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, the . . . day of . . . in the year 1860.

Sealed and delivered in
presence of
E. F.

A. B. [L. s.]

NOTE. It should be acknowledged or proved, and recorded, as is required in the case of deeds.

No. 91.

SUBSTITUTION OF AN ATTORNEY.

Know all men by these presents, that I, C. D., of, by virtue of the power and authority to me given in and by the letter of attorney of A. B., of which is hereto annexed, do substitute and appoint L. M., of, to do, perform and execute every act and thing which I might or could do, in, by and under the same, as well for me, as being the true and lawful attorney and substitute of the said A. B., as for the said A. B., hereby ratifying and confirming all the said

attorney and substitute hereby made and appointed, shall do in the premises by virtue hereof, and of the said letter of attorney.

In witness whereof, I have hereunto set my hand and seal, the day of.... in the year 1860.

Sealed, &c.

C. D. [L. s.]

To be acknowledged and recorded.

No. 92.

REVOCATION OF A POWER OF ATTORNEY.

Know all men by these presents: That whereas I, A. B., of, in and by my letter of attorney, bearing date the day of, 1860, did make, constitute and appoint C. D., of &c. my true and lawful attorney, for me and in my name to &c., [here copy the language of the letter of attorney, or state the substance of it,] as by the said in part recited letter of attorney will more fully and at large appear: Now know ye, that I, the said A. B., have revoked, countermanded, annulled and made void, and by these presents do revoke, countermand, annul and make void the said letter of attorney, and all power and authority thereby given, or intended to be given, to the said C. D.

In witness, &c.

A. B. [L. s.]

Sealed and delivered, &c.

It should be acknowledged or proved, and recorded. It should be served on the attorney, by delivering it to him. And notice should be given of the revocation by publication in the newspapers, or otherwise.

When a power of attorney forms a part of the security for a loan of money, as for instance, the power of sale in a mortgage, it is irrevocable.

(See ante, page 267.)

No. 93.

POWER OF REVOCATION AND APPOINTMENT, IN MARRIAGE SETTLEMENT; AND OF APPOINTING A NEW TRUSTEE IN CASE OF DEATH.

And it is hereby covenanted and agreed by and between the parties to these presents, that the parties of the *second* part [the intended husband who makes the settlement] and *third* part [the trustees] shall be, and they are hereby authorized, during the continuance of the trust, to lease and demise the granted premises for such lawful term or terms, and at such rents and upon such covenants as to renewals, as to them shall seem proper; and that they shall be and hereby are authorized and empowered to grant, bargain, sell and convey in fee simple absolute, at public or private sale, for cash or upon credit, or partly for cash and partly upon credit, all or any part or parcel of the said trust or premises, or of any other premises in which the proceeds thereof may be reinvested, and to invest the proceeds of such sale or sales in other real estate, or upon bonds and mortgages within the state of New York, or in the public stocks of the United States or of the city of New York, or in improving other parts of the said real estate, and to alter and

change such investments from time to time as they may think proper; and that the rents, profits, interests, dividends and other income thereof, shall be held and applied by the parties of the second and third part, upon the same trusts with the like powers and upon the same conditions, covenants and agreements as herein expressed and declared.

And it is further agreed, that upon the death of either of the trustees, the survivor or survivors may, with the consent in writing of the said party of the fourth part, [the intended wife, the *cestui que trust*,] nominate and appoint another trustee in his place, and thereupon the trust premises shall be held by the substituted trustee and the survivors, with the same powers and upon the same conditions herein before expressed and declared.

NOTE. See *Belmont v. O'Brien*, 2 Kernan, 394, from which the above was taken with some variations, and remarks on it by Judge Hand at page 404, in same case. He says, the powers of charging, selling, exchanging, jointuring and leasing, usually inserted in marriage settlements, are in effect powers of revocation and appointment; and postpone, abridge or defeat, in a greater or less degree, the previous uses and estates, and appoint new uses in their stead.

No. 94.

POWER IN TRUST UNDER THE REVISED STATUTES, WHICH MAY BE CREATED EITHER BY DEED OR WILL.

"I give and devise all my property and estate, both real and personal, wheresoever the same may be, to S. G., of &c., *in trust*, nevertheless to answer the intent and meaning of this will, viz: It is my will that the said S. G. *shall*, within a reasonable time after my decease, and within sufficient time to pay the legacies hereinafter mentioned and bequeathed, *sell, dispose of and convey* all my estate, both real and personal, at public auction or private sale, as he may deem proper, and *out of the moneys* arising from such sale of my said real and personal estate, first, *to pay all my just debts*, funeral charges and the expense of settling my estate."

NOTE. *Germond v. Jones*, 2 Hill, 570; remarks of Bronson, J. at page 574.

No. 95.

A POWER, AND NOT A TRUST, IN A WILL.

"I do authorize and empower my executors to exchange, sell and convey to and with adjoining owners or others, such gores, strips or pieces of land as they may deem advantageous to my estate, by straightening and equalizing boundary lines, and to execute, deliver and receive sufficient deeds therefor."

(*Tucker v. Tucker*, 1 Seld. 410; remarks of Ruggles, J. thereon at page 422, and by Foot, J. at page 413.)

TRUSTS.

See Assignments No. 32, and post under Wills.

WILLS.

No. 96.

WILL OF REAL AND PERSONAL PROPERTY.

In the name of God, amen. I, A. B., of the town of, in the county of, and state of New York, aged years and upwards, and being of sound disposing mind and memory, do make and publish this my last will and testament, in manner following, to wit:

First. I give, devise and bequeath to C. D., of &c., all the real and personal property of which I may die seised and possessed, and to his heirs and assigns, forever.

Lastly. I appoint E. F., of, executor of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereto subscribed my name this day of, 1860. A. B.

NOTE. It is not necessary that a will should be under seal. It is good, with or without a seal.

ATTESTATION.

We, whose names are hereto subscribed, do certify, that A. B., the testator, subscribed his name to this instrument in our presence, and in the presence of each of us, and at the same time he declared in our presence and hearing that the same was his last will and testament, and requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, and which we have done accordingly, in the presence of the testator and of each other, the day of the date of the said will.

J. K., of the town of, county of

L. M., of the town of, county of

NOTE. For form of will containing various provisions, see Willard on Executors, 473 et seq. 4 Newnam's Conveyancer, 738 et seq. And see the will of William James, in *Hawley v. James*, 16 Wend. 61 et seq., and the remarks thereon by the counsel and court. S. C. before the chancellor, 5 Paige, 318 et seq. *Coster v. Lorillard*, 5 id. 172 et seq.; and S. C. on appeal, 14 Wend. 265 et seq., and remarks of the judges. The will in both of those cases was drawn with great ability, shortly after the revised statutes took effect. The criticisms on the various contested items will enable the draftsman to avoid the errors which crept into them. Also, see *Harris v. Clark*, 3 Seld. 242 et seq.

No. 97.

CODICIL.

This is a codicil to my last will and testament, bearing date the day of, 1860.

I give and bequeath to L. M. one hundred dollars.

In witness, &c.

(To be executed and attested, like the original will.)

No. 98.

CLAUSE DEVISING TO A MARRIED WOMAN REAL ESTATE IN FEE, WITH A GENERAL AND BENEFICIAL POWER TO DISPOSE OF IT DURING HER MARRIAGE, WITHOUT THE CONCURRENCE OF HER HUSBAND, UNDER § 80 OF THE ACT "OF POWERS." 1 R. S. 732.

"I give and devise to A. B., wife of C. D., of, the house and lot which I own in 14th street, in the city of New York, known as No. in said street, being 25 feet in front and rear, and 120 deep, to her and her heirs in fee; and I empower her to dispose of the same, during her marriage, without the concurrence of her husband, to any one whom she may choose, for her own benefit, either by a deed or by an instrument in writing in the nature of a will, and executed in the manner of executing wills by the revised statutes."

NOTE. See *Strong v. White*, 1 Barb. Ch. 13, 14; *Frazer v. Western*, Id. 240; *Wright v. Talmadge*, 1 Smith, 313; *Jackson v. Edwards*, 22 Wend. 498.

Under a devise with a power, like the above, the husband, if he survives his wife, will have no estate by the curtesy. She may devise it to her husband or any one else.

No. 99.

CLAUSE CONTAINING PROVISION FOR THE ACCUMULATION OF THE INCOME OF REAL ESTATE, FOR THE BENEFIT OF INFANTS WHO ARE IN ESSE AT THE TIME SUCH ACCUMULATIONS ARE DIRECTED TO COMMENCE, AND WHICH ARE TO TERMINATE WITH THE MINORITIES OF THE INFANTS.

"I order and direct that one fourth part of my real and personal estate, or the avails thereof, be placed at interest, and the interest or income thereof, during the life of my son B. C., be applied, at the discretion of my executors, towards the support of the family of the said B. C., and the education of his children born and to be born; and that the principal of the said one fourth, and what may remain of the interest or income thereof, be distributed and divided, as soon after his decease as can conveniently be done, unto and among the then living children of my said son B. C., and the issue of such of them, if any, as shall then have deceased leaving lawful issue then living; each child of his then living taking one equal share thereof, and the issue of such of them as shall have then deceased leaving lawful issue then living, if one, solely; if more than one, jointly and equally; taking by representation, the share or shares which his, her or their parent or parents would have taken if living."

See *Haxtun v. Corse*, (2 Barb. Ch. 509,) and the remarks of the chancellor on the above, at page 517, holding it to be valid. (1 R. S. 728, § 55, sub. 3.) It suspends the power of alienation only during the life of B. C. It is subject to open and let others into the class, from time to time. See also *Savage v. Burnham*, (17 N. Y. Rep. 561.)

No. 100.

CLAUSE, CHARGING THE TESTATOR'S REAL ESTATE AS THE PRIMARY FUND FOR THE PAYMENT OF DEBTS, IN EXONERATION OF THE PERSONALTY.

"I give and devise all my real estate, [or, as the case may be, a certain farm, situate in, known as the farm,] to A. B., and to his heirs and

assigns forever, subject to the payment of two hundred dollars a year, in half yearly payments, to my widow during her life, in lieu of her right of dower in my estate, [or in said farm,] and subject also to the payment by the said A. B. of a bond given by me to H. O. for 1500 dollars, money loaned for my use, and subject to the payment of all the debts which I may owe at the time of my death."

(*Smith v. Wyckoff*, 11 Paige, 50, and the remarks of the chancellor, at page 57, et seq.)

No. 101.

CLAUSE IN A WILL, DIRECTING TRUSTEES TO RECEIVE THE RENTS AND PROFITS OF LANDS, AND APPLY THEM TO THE USE OF THE BENEFICIARY, ETC.

"I hereby appoint my executors, hereinafter named, trustees of the estate of my two daughters, hereby authorizing and desiring my executors, as such trustees, to take charge of all such portion of my estate as is herein given to them respectively, *and to pay over to them respectively*, from time to time, the rents, interests or net income thereof; and in case of the marriage of both or either of them, it shall be sufficient in making such payments, from time to time, to take the receipt of my said daughters respectively, without the signature or consent of their respective husbands, and in the same manner and with the like effect as if they were sole and unmarried."

Note the language of § 55, 1 R. S. 728, sub. 3, is: To receive the rents and profits of lands and *apply them to the use of any person, &c.* In general, it is desirable to follow the language of the statute in creating a trust, but it has been held that a trust *to pay over, &c.*, is a valid trust within the above section. (*Gott v. Cook*, 7 Paige, 523. *Leggett v. Perkins*, 2 Comst. 297, 306. *Mason v. Jones*, 2 Barb. S. C. R. 229; affirmed on appeal, 3 Comst. 375.)

No. 102.

ANOTHER FORM OF CHARGING REAL ESTATE WITH DEBTS OR LEGACIES.

I expressly charge the payment of my debts and of the legacies herein bequeathed upon my real estate as the primary fund, and I authorize and empower my executors, hereinafter named, to sell the whole, or any part thereof, in fee simple, at public or private sale, for cash or a reasonable credit, not exceeding years, and to execute proper conveyances of the same to the purchaser or purchasers thereof, and to apply the avails in the payment of debts and legacies.

The above is a general power in trust. (1 R. S. 732, 734, § 77, 94. *Selden v. Vermilyea*, 1 Barb. S. C. R. 58.) See remarks of Edmonds, J.

No. 103.

ANOTHER FORM OF CHARGING REAL ESTATE, BY CREATING A TRUST.

I give and devise my farm in A., [describing it,] to my executor, hereinafter named, in fee simple, in trust, to sell the same for the benefit of my creditors.

(1 R. S. 728, § 55.)

No. 104.

ANOTHER FORM OF DEVISE, WHEN THE EXECUTORS TAKE THE FEE BY IMPLICATION.

I give unto my two daughters, S. and M., the remaining two fifths of my estate, so that each may have and enjoy the interest or income of the one fifth part thereof, during their several natural lives, and at their deaths, respectively, I will the share to their respective lawful issue, their heirs and assigns forever.

Item: I hereby appoint my executors hereinafter named, trustees to the estate of my two daughters, hereby authorizing and desiring my executors, as such trustees, to take charge of all such portion of my estate as is herein given to them respectively, and to take care of, manage and improve the same to the best advantage, and to pay over to them, respectively, from time to time, the rents, interests or net income thereof, &c. &c., as in No. 101, supra.

(*Leggett v. Perkins*, 2 Comst. 298; remarks of Gardiner, J., at page 305, 306.)

No. 105.

A DEVISE DIRECTING AN ACCUMULATION OF RENTS AND PROFITS FOR THE BENEFIT OF INFANT CHILDREN OF THE TESTATOR.

I give and devise all the residue of my estate, real and personal, to my executors in trust, to receive the rents and profits of the land, and the interest of the personal estate, and to pay and appropriate such sums as may be necessary for the respectable support and education of my minor children, until they shall severally arrive at the age of twenty-one years, and that the surplus, if any, be accumulated for the benefit of the said minors, until the expiration of their minority.

(*See Vail v. Vail*, 4 Paige, 328; *Hunter v. Hunter*, 17 Barb. 25; *Haxtun v. Corse*, 2 Barb. Ch. 506; 1 R. S. 726, § 37; *Id.* 728, § 55, sub. 4.)

No. 106.

CLAUSE IN A WILL CONTAINING A DEVISE OR BEQUEST TO A RELIGIOUS OR CHARITABLE SOCIETY.

I give and devise to the trustees of the Presbyterian Church in the house and lot in which I now live, in the village of, for a parsonage. And I also bequeath to the said trustees the sum of one thousand dollars for the uses and purposes for which the said trustees are authorized by law to take and hold property; and I authorize my executor to pay the same to the order in writing of the said trustees. Or—

I give and bequeath to "The American Board of Commissioners for Foreign Missions," one thousand dollars, to be paid to the person who shall be at the time of such payment the treasurer of the said board, or be otherwise authorized by the said board to receive it.

NOTE. (1.) By the general law, a corporation is not authorized to take a devise of real estate, unless it is expressly so authorized by its charter. (2 R. S. 57, § 3.)

(2.) The corporate name should be so expressed as to leave no doubt of the intention of the testator, as to the object of his bounty. A *misnomer* does not vi-

tiate, provided the corporation intended is apparent. (Angel & Ames on Corporations, 78, 150.)

(3.) If the devise or bequest be to a benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, by a person having a husband, wife, child or parent, it shall not pass more than one half part of his or her estate, after the payment of his debts. (L. of 1860, p. 607, ch. 360.)

(4.) By the laws of 1848, p. 447, such bequest to a corporation formed under said act, is not valid unless made and executed at least two months before the death of the testator. (§ 6.)

(5.) For the purposes for which a religious society may hold property, see the general act, 3 R. S. 292 et seq., and § 4, p. 395. 2 R. S. 604, 621, 5th ed.

No interest to vest in *successors* of ecclesiastics. (2 R. S. 622, 5th ed. L. of 1855, ch. 230.)

(6.) For the general doctrine of charitable bequests, see *Williams v. Williams*, (4 Seld, 525 et seq.,) and the cases in Willard's Eq. Jur. 569 to 598. (2 Smith's Rep. 83.) *Trustees of Auburn Th. Sem. v. Kellogg*, (4 Kernan, 380.)

No. 107.

CLAUSE IN A WILL DIRECTING THE ACCUMULATION OF MONEY DURING THE LIFE OF THE TESTATOR'S DAUGHTER, AND ON HER DEATH, THAT IT BE PAID TO THE MINOR CHILDREN OF THE SAID DAUGHTER, WHO ARE SUCH AT THE DEATH OF THE TESTATOR.

I direct that my executor, hereinafter named, loan out, on bond and mortgage, one thousand dollars of my estate on interest, to be paid semi-annually to himself, in trust to pay such portion of it as may be necessary for the support of my daughter E., in case of the inability of her husband to support her, and to accumulate such as is not needed for her support; and on the death of my said daughter E., all the said principal and the interest thereon, and the accumulations thereof, shall be divided among the minor children of the said E. who are in being at the time of my death.

(See 1 R. S. 773, § 1, 3, sub. 1. *Kilpatrick v. Johnson*, 1 Smith's Rep. 322, 325, 326.)

EXTRACTS FROM THE EXISTING STATUTES OF THE STATE OF NEW YORK, WITH RESPECT TO THE PROOF AND RECORDING OF DEEDS, SHOWING BEFORE WHAT OFFICERS SUCH PROOF OR ACKNOWLEDGMENT MAY BE TAKEN, IN DIFFERENT PARTS OF THE WORLD.

(3 Revised Statutes, 5th ed. p. 46 et seq.)

§ 4. To entitle any conveyance hereafter made, to be recorded by any county clerk, it shall be acknowledged by the party or parties executing the same, or shall be proved by a subscribing witness thereto, before any one of the following officers:

If acknowledged or proved within this state; the justices of the supreme court, judges of county courts, mayors and recorders of cities, or commissioners of deeds [justices of the peace in towns]; but no county judge or commissioner of deeds for a county or city, shall take any such proof or acknowledgment, out of the city or county, for which he was appointed.

If acknowledged or proved out of this state, and within the United States; the chief justice and associate justices of the supreme court of the United States, dis-

strict judges of the United States, the judges or justices of the supreme, superior or circuit court, of any state or territory within the United States, and the chief judge or any associate judge of the circuit court of the United States, in the District of Columbia; but no proof or acknowledgment, taken by any such officer, shall entitle a conveyance to be recorded unless taken within some place or territory, to which the jurisdiction of the court to which he belongs shall extend.

Every acknowledgment or proof of a deed or mortgage made or taken before the mayor of either of the cities of Philadelphia or Baltimore, or before any consul of the United States resident in any foreign port or country, or before a judge of the highest court in Upper Canada or Lower Canada, and certified by them respectively, shall be as valid and effectual as if taken before one of the justices of the supreme court of this state. (1829, ch. 222.)

Every acknowledgment or proof of a deed or mortgage, made or taken before the mayor of any city in the United States, and certified by him, shall be as valid and effectual as if taken before one of the justices of the supreme court of this state. (1845, ch. 109.)

§ 5. The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person residing out of this state, and within any other state or territory of the United States, may be made before any officer of such state or territory authorized by the laws thereof to take the proof and acknowledgment of deeds; and when so taken and certified as herein provided, shall be entitled to be recorded in any county in this state, and may be read in evidence in any court in this state, in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments: Provided that no such acknowledgment shall be valid unless the officer taking the same shall know or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the said deed or instrument. (1848, ch. 195, § 1.)

§ 6. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section, to be read in evidence or recorded in this state, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate under the name and official seal of the clerk, register, recorder or a prothonotary of the county in which such officer resides, or of the county or district court, or court of common pleas thereof, specifying that such officer was at the time of taking such proof or acknowledgment duly authorized to take the same, and that such clerk, register, recorder or prothonotary is well acquainted with the handwriting of such officer, and verily believes that the signature to said certificate of proof or acknowledgment is genuine. (Same ch. § 2, as amended 1856, ch. 61, § 2.)

§ 7. The acknowledgment of any deed, mortgage or other conveyance of any real estate within this state, and of any contract in relation to such real estate, and of any power of attorney authorizing the conveying, mortgaging or otherwise disposing of such real estate, or of making any contract in relation thereto which has been or shall be executed by an officer or soldier of the army of the United States, employed at the time of making such acknowledgment within the territory of the republic of Mexico, may be taken within such territory before and certified by any major-general, brigadier-general or colonel of the said army, to whom the person

making such acknowledgment shall be personally known at the time of making the same. The certificate of any acknowledgment taken and certified by virtue of this act, shall state the place at which it was taken, and the fact that the person making the same is an officer or soldier of the said army, of which facts such acknowledgment shall be presumptive evidence. Every acknowledgment so taken and certified shall have the same force and effect in all respects as if the same were taken and certified within this state by an officer authorized by law to take and certify the same. (1847, ch. 170.)

§ 8. The governor of this state is hereby authorized to name, appoint and commission so many commissioners in such of the other states and territories of the United States, or in the District of Columbia, or in Canada, as he may deem expedient, provided that the number of commissioners shall at no time exceed five in any one city or county; the said commissioners shall continue in office for four years, and shall have authority to take the acknowledgment and proof of the execution of any deed, mortgage, lease or other conveyance of any lands, tenements or hereditaments, lying and being in this state, or of any contract, assignment, transfer, letter of attorney, satisfaction of a judgment or of a mortgage, or of any other writing or instrument under seal to be used or recorded in this state, also to administer an oath or affirmation, to any person or persons who may desire to make such oath or affirmation. (1850, ch. 270, § 1, as amended 1857, ch. 788, § 1.)

§ 9. Any acknowledgment or proof taken in pursuance of the powers and under the directions and limitations conferred by and mentioned in this act, in manner directed by the laws of this state, with respect to the acknowledgment or proof of deeds, taken by any officer authorized to take such acknowledgment, residing within this state, and certified by any one of said commissioners, whose appointment is authorized by this act, before whom the same shall be taken or made under his hand and official seal; which certificate shall be indorsed on said deed or other instrument mentioned in the first section of this act, shall when authenticated in the manner hereinafter provided, be entitled to be recorded in any county in this state, and shall have the same force and effect, and be as good and available in law for all purposes, as if the same had been taken or made before any officer authorized to take such proof or acknowledgment, residing in this state: and any affidavit or affirmation made before any such commissioner, certified and authenticated as aforesaid, may be read in evidence, and shall be as good and effectual to all intents and purposes, as if taken and certified by an officer authorized to administer oaths, residing in this state. (1850, ch. 270, § 2.)

§ 10. Every commissioner appointed by virtue of this act, shall before he performs any duty under and by virtue of his said appointment, and of this law, take and subscribe an oath or affirmation before a justice of the peace, or some other magistrate in the city or county in which he shall reside, well and faithfully to execute and perform all the duties of such commissioner, under and by virtue of the laws of the State of New York, which oath or affirmation shall be filed in the office of the secretary of this state, and every such commissioner shall also before he enters upon the duties of his office, cause to be prepared an official seal, in which shall be designated his name, and the words "a commissioner of deeds for the state of New York," together with the name of the state or territory, (or country if in Canada,) and also of the city or county in which he shall reside, and for which he shall have been appointed, and shall transmit to and cause to be filed in the office

of the secretary of state, a distinct impression of such seal, taken upon wax or some other substance capable of receiving and retaining a clear impression, together with his signature in his own proper writing. (Same ch. § 3, as amended 1857, ch. 788, § 2.)

§ 11. When any deed or other instrument shall be proved or acknowledged, or any oath or affirmation shall be taken before any commissioner appointed by virtue of this act, before it shall be entitled to be used, recorded or read in evidence, in addition to the preceding requisites there shall be subjoined or affixed to the certificate, signed and sealed by such commissioner as aforesaid, a certificate under the hand and official seal of the secretary of state of this state, certifying that such commissioner was at the time of taking such proof or acknowledgment, or of administering such oath or affirmation, duly authorized to take the same, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and has also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he verily believes the signature and the impression of the seal of the said certificate to be genuine. (1850, ch. 270, § 4.)

§ 12. No commissioner appointed under or by virtue of this law, shall be authorized to take the proof or acknowledgment of any deed or instrument, or to administer any oath or affirmation at any place other than within the city or county within which he shall reside at the time of his appointment, and every certificate of any such commissioner to any proof or acknowledgment taken before him, or to any oath or affirmation administered by him, shall specify the day on which, or the city or town and county within which the same was taken or administered; and without such specification the said certificate shall be wholly invalid, inoperative and void. (Same ch. § 5.)

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§ 17. Any deed or conveyance or other written instrument, affecting real estate within this state, proved or acknowledged in any other state or territory of the United States, according to the laws of such state or territory, where the grantor or grantors of such deed or conveyance and the officer before whom the same shall be proved or acknowledged shall be dead; and when such proof or acknowledgment shall be certified as herein provided, may be recorded in any county of the state, and may be read in evidence in any court of this state, in the same manner and with the like effect as though the same had been proved or acknowledged as required by the laws of this state, provided that the death of the grantor or grantors, and of the officer before whom the same shall be proved or acknowledged, shall be proved by the affidavit of one or more persons, sworn to before some officer authorized by law to administer oaths in such state or territory, and certified as herein provided. (1858, ch. 259, § 1.)

§ 18. To entitle such deed or conveyance, or other written instrument, to be read in evidence or recorded in this state, there shall be annexed to the certificate of proof or acknowledgment, signed by such officer, a certificate under the name and official seal of the clerk or register of the county in which such officer resided, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk or register is well acquainted with the handwriting of such officer, and verily believes that the signa-

ture to said certificate of proof or acknowledgment is genuine, and that such deed or conveyance or written instrument, is proved or acknowledged in all respects, as required by the laws of such state or territory. There shall also be a like certificate of such clerk or register, attached to the jurat or affidavit, proving the death of the grantor or grantors, and of the officer before whom the deed or written instrument was proved or acknowledged, certifying that such officer was, at the time of taking such affidavit or affidavits, duly authorized to take the same, and that such clerk or register is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or affidavit is genuine. Such affidavit or affidavits shall be recorded with such deed or other written instrument, and be presumptive evidence of the facts therein stated. (Same ch. § 2.)

§ 19. [Sec. 5.] If the party or parties executing such conveyance, shall be, or reside, in any state or kingdom in Europe, or in North or South America, the same may be acknowledged or proved before any minister plenipotentiary, or any minister extraordinary, or any *charge des affaires* of the United States, resident and accredited within such state or kingdom. If such parties be or reside in France, such conveyance may be acknowledged or proved before the consul of the United States, appointed to reside at Paris; and if such parties be or reside in Russia, such conveyance may be acknowledged or proved before the consul of the United States, appointed to reside at St. Petersburg.

§ 20. [Sec. 6.] If the party to such conveyance be or reside within the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, the same may be acknowledged or proved before the mayor of the city of London, the mayor or chief magistrate of the city of Dublin, or the provost or chief magistrate of the city of Edinburgh, or before the mayor or chief magistrate of Liverpool, or before the consul of the United States, appointed to reside at London.

§ 21. [Sec. 7.] Such proof or acknowledgment, duly certified under the hand and seal of office of such consuls, or of the said mayors or chief magistrates respectively, or of such minister or *charge des affaires*, shall have the like force and validity, as if the same were taken before a justice of the supreme court of this state.

§ 22. The officers authorized by the fifth and sixth sections of chapter three, part second, of the revised statutes, to take the proof and acknowledgment of deeds conveying real estate, and also any other consul or vice-consul or minister resident of the United States, appointed to reside at any foreign port or place, are hereby authorized to administer oaths or affirmations to any person or persons who may desire to make such oath or affirmation; and any affidavit or affirmation made before any such officer, and certified and authenticated as provided in the seventh section of said chapter in respect to the proof and acknowledgment of a deed conveying real estate, may be read in evidence and shall be as good and effectual to all intents and purposes as if taken and certified by an officer authorized to administer oaths, residing in this state, and no other proof of the official character of such officer than the certificate annexed to such affidavit or affirmation shall be required. (1854, ch. 206.)

§ 23. [Sec. 8.] Every such conveyance heretofore made, or hereafter to be made, may be acknowledged or proved, without the United States, before any person specially authorized for that particular purpose, by a commission under the seal of the supreme court of this state, to be issued to any reputable person residing in or going to the country where such proof or acknowledgment is to be taken; and the

acknowledgment or proof so taken shall be of the like force and validity as if the same were taken before a justice of the supreme court of this state.

§ 24. The governor of this state is hereby authorized to appoint and commission one or more, and not exceeding three commissioners, in each of the following cities: London, Liverpool and Glasgow in Great Britain, and Paris and Marseilles in France, who shall continue in office for four years, and until a successor shall be appointed, and shall have authority to take the acknowledgment or proof of the execution of any deed or written instrument to be recorded or read in evidence in this state, except bills of exchange, promissory notes, and last wills and testaments; and also to administer an oath or affirmation to any person or persons who may desire to take the same, and to certify the taking of such oath or affirmation, and also to certify the existence of any patent, record or other document, remaining of record in any public office or official custody in Great Britain or France, and the correctness of a copy of any such patent, record or other document. The certificate of any one of such commissioners, under his official seal, and subscribed by him, in regard to the acknowledgment or proof of the execution of any such deed or written instrument, or the taking of such oath or affirmation, or the existence or correctness of a copy of such patent, record or document, when authenticated by the secretary of state, as hereinafter mentioned, shall have the same effect to authorize the recording or reading in evidence of such deed or written instrument, oath or affidavit, patent, record or document, as is given by law to like certificates made by justices of the supreme court of this state, or to any certificate or exemplification by any office of this state of any patent, record or other document. (1858, ch. 308, § 1.)

§ 25. Before any such deed or other instrument, oath or affidavit, patent, record or document, shall be entitled to be used, recorded or read in evidence, in addition to the preceding requisites, there shall be subjoined or affixed to the certificate signed and sealed by such commissioner as aforesaid, a certificate under the hand and official seal of the secretary of state of this state, certifying that such commissioner was, at the time of taking such proof or acknowledgment or of administering such oath or affirmation, duly authorized to take the same, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and has also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he believes the signature and the impression of the seal of the said certificate to be genuine. (Same ch. § 2.)

§ 26. Every commissioner appointed by virtue of this act, before performing any duty or exercising any power in virtue of his appointment, shall take and subscribe an oath or affirmation before a person authorized to administer such oath or affirmation by the laws of this state, or before a judge or clerk of one of the courts of record of the kingdom or empire in which such commissioner shall reside, well and faithfully to execute and perform all the duties of such commissioner under and by virtue of the laws of the state of New York; and shall also cause to be prepared an official seal, on which shall be designated his name, and the words "commissioner of deeds for the state of New York," with the name of the city for which he shall be appointed; and shall cause a distinct impression of such seal, taken upon wax

or some other substance capable of receiving and retaining a clear impression, together with his signature in his own proper writing, and the oath or affirmation above in this section mentioned, duly certified by the person before whom it may be taken, to be filed in the office of the secretary of this state. (Same ch. § 3.)

* * * * *

§ 30. The fees of such commissioner for services under this act shall be as follows: In Great Britain, for administering each oath and certifying the same, and for making each certificate attached to a patent, record or other document, one shilling sterling; in France, one franc and twenty-five centimes. In Great Britain, for taking each acknowledgment or proof of any deed or written instrument to be recorded or read in evidence, four shillings sterling; in France, five francs. (Same ch. § 7.)

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